Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

# APPENDIX

# In the Supreme Court of the United States

OCTOBER TERM, 1974

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## No. 74-521

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
PETITIONER

v.

DELTA MINING, INC.; G.M.W. COAL COMPANY, INC.;
AND EDWARD MEARS, ET AL.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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**PETITION FOR WRIT OF CERTIORARI FILED NOVEMBER 1, 1974—CERTIORARI GRANTED JANUARY 27, 1975**

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*MORTON* v. *DELTA MINING, INC.*
No. 72-857, W.D. Pa.

Docket Entries

| | |
|---|---|
| 1972 | |
| Oct. 13 | Complaint filed |
| Oct. 13 | Summons issued |
| Oct. 20 | Letter advs case assigned to Judge McCune |
| Nov. 1 | Summons ret served on agent of Delta Mining on 10/19 by regis. mail and on representative of miners at DEltaMining by registered mail on 10/19/72 |
| Nov. 8 | Motion for extension of time to answer and proposed order filed. |
| Nov. 8 | Letter to Atty Blackwell re: local rule 1 (local counsel) |
| Nov. 8 | Letter to Atty Blackwell advising case assigned Judge McCune) |
| Nov. 9 | Order ent on motion filed 11/8 directing deft have extension until 11/30 to answer (McCune, J) |
| Nov. 27 | ANSWER filed with certificate of service thereon with request for jury trial |
| 1973 | |
| Jan. 5 | Motion to transfer action to Middle Dist of Pa filed by deft with certificate of service attached |
| Jan. 8 | Order ent assigning case to Judge Gourley (McCune, J) |
| Jan. 9 | Answer to motion to transfer filed by U S Atty |
| Jan. 10 | Order ent setting hearing on motion to transfer case for 1/16 at 10 AM (Gourley, J) |
| Jan. 16 | Hearing on motion to transfer held before Gourley, J. (denied)—Memo filed (rep M Schmitt) |
| Jan. 16 | Order ent directing attached certification from Marshal be made part of record (Gourley, J) |

1973

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| Jan. 16 | Memorandum order ent denying motion to transfer to Middle Dist of Pa.—Further, case consolidated with 72-890 (Gourley, J). |
| Jan. 24 | Praecipe for appearance for G. M W Coal Co at 72-890 and Delta Mining 72-857 filed by Franklyn E. Conflenti, Esq. (filed this no) |
| Jan. 24 | Letter o Atty Conflenti advising case assigned to Gourley, J (filed this no) |
| Jan. 24 | Order ent modifying order of 1/16 and directing pretrial be conducted on 2/14 at 10 AM. Stip of facts not disputed to be filed by 2/12/73 (Gourley, J) |
| Jan. 31 | Transcript of hearing held 1/16 before Gourley, J. filed (rep M Schmitt) (filed this no) |
| Feb. 9 | Motion to withdraw as atty for defts filed by E. W. Van Horn, Jr. (filed this no) and order ent granting same (Gourley, J) |
| Feb. 9 | Joint stipulation of facts filed this no. |
| Feb. 13 | Defts' notice of and motion for judgment on the pleadings filed. |
| Feb. 14 | Hearing on motion for judgment on pleadings and pretrial conference held before Gourley, J. —Memo filed (rep M Schmitt) (filed this no.) (cases not consolidated) |
| Feb. 15 | Order ent 2/14 denying motion for summary judgmt; Further, order ent previously consolidating case with 72-890 is hereby vacated (Gourley, J) |
| Feb. 15 | Order ent 2/14 assigning case to Judge Sorg and directing reporter transcribe record of pretrial at joint expense of parties and file same with Clerk (Gourley, J) |
| Feb. 23 | Motion to withdraw appearance and proposed order filed by Thomas J. MacBride, Esq. |
| Feb. 26 | Order ent, attached to motion filed 2/23, granting motion of Thos MacBride, Esq. to withdraw as atty for defts (Sorg, J) |



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|---|---|
| Feb. 26 | Transcript of pretrial conference of 2/14/73 before Gourley, J filed (rep M Schmitt) |
| Feb. 28 | Hearing on further pretrial held before Sorg, J.—Memo filed (no rep) filed this no. (supple pret stip to be filed by 4/10, trial set for 5/7) |
| May 25 | Order ent, pursuant to memorandum filed at CA 72-890, directingjudgmt be ent in favor of deft andagainst plf (Sorg, J) |
| May 25 | Pursuant to order, ent jdgmt is hereby ent of record (B. Schaffer, Clerk) in favor of deft and against plf |
| May 25 | Notice mailed |
| Jul. 24 | NOTICE OF APPEAL FILED by U S Atty from judgmt of Judge Sorg on 5/25/73 |
| Jul. 24 | copy notice to ct of appeals and opposing counsel, letters to counsel & J Sorg |
| Aug. 20 | ORIG RECORD MAILED TO CT OF APPEALS (no exhibits in case) |
| Aug. 22 | Receipt for orig record recd from ct of appeals |
| Sept. 4 | Letter received from U.S. Ct. of Appeals advising appeal was docketed at No. 73-1752. |

1974

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|---|---|
| Apr. 1 | Opinion of U.S.Ct. of Appeals rec'd and filed affirming judgment of district court (filed 72-857) |
| June 13 | cc judgmt in lieu of formal mandate affirming judgmt of district court and taxing costs against appellant U S and in favor of appellees in the amt of $211.05 |
| June 13 | Judgmt for costs in the amt of $211.05 ent in favor of deft and against plf inasmuch as costs were taxed by ct of appeals (B. Schaffler, Clerk) |
| June 13 | Record recd from ct of appeals and receipt issued for same |
| June 17 | Order from ct of appeals amending opinion filed Mar 20, 1974—1st sentence is amended |

1974

and last word in line 10 on page 9 is deleted (filed this no)

1975

Feb. 11 Copy of letter from Supreme court to Circuit Ct dated 2/6/75 and letter to B. Schaffler, from Quinn, Clerk of Circuit court dated 2/10 requesting record in this case

Feb. 11 Pursuant to letter reed from Clerk Quinn, and granting of certiorari on 1/27, original record forwarded to Supreme Court with docket entries



IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | |
|---|---|
| ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, UNITED STATES DEPARTMENT OF THE INTERIOR, *Plaintiff* v. DELTA MINING, INC. *Defendant* | CIVIL ACTION NO. 72-857 |

## COMPLAINT FOR ENFORCEMENT OF CIVIL PENALTY ASSESSMENT ORDER

The Petition of Rogers C. B. Morton, by Richard L. Thornburgh, United States Attorney for the Western District of Pennsylvania, respectfully submits that:

1. This Complaint is for the enforcement of a civil penalty assessment order issued under an Act of the United States, namely the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. § 801 *et seq.*) (the Act).

2. Jurisdiction of this action is conferred upon the Court by Section 109(a) of the Act (30 U.S.C. § 819(a) and 28 U.S.C. § 1355.

3. Defendant is, and at all relevant times was a corporation, organized and existing under the laws of the Commonwealth of Pennsylvania, operating a coal mine subect to the Act in Somerset County, Pennsylvania, within the jurisdiction of this Court and maintaining its principal office at State Line, Pennsylvania.

4. Pursuant to Section 109(a) of the Act, a civil penalty in the amount of $375.00 was lawfully assessed against the Defendant for violation of the Act. A true copy of the Proposed Order of Assessment, which, in the absence of any protest or request by the Defendant for a hearing, became final on April 11, 1972, is attached hereto and made a part hereof Petitioner's Exhibit "A".

5. Said assessment order has not been vacated, modified, reversed or withdrawn and therefore is the final order of the Secretary of the Department of the Interior, within

the meaning and purview of Section 109(a)(4) of the Act (30 U.S.C. 819(a)(4)).

6. Despite demand, Defendant has failed and refused to pay said civil penalty as required by law.

WHEREFORE, Plaintiff respectfully prays that the Court enter judgment against the Defendant for $375.00 together with interest and costs.

[Filed October 13, 1972]



UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C.

August 17, 1972

## CERTIFICATION OF RECORD

Pursuant to Title 30, Section 819(a)(4), Title 43, Section 1460, and Title 28, Section 1733, United States Code, and by virtue of the authority delegated to me by the Secretary of the Interior, I hereby certify that the annexed documents are true copies of the official record of the Bureau of Mines in the matter of the assessment of civil penalty against Delta Mining, Incorporated Delta No. 1 Mine Stonycreek Township, Somerset County, Pennsylvania Bureau of Mines Case No. 2312

IN TESTIMONY WHEREOF, I have hereunto subscribed may name, and caused the seal of the Bureau of Mines, Department of the Interior, to be affixed on the day and year first above written.

/s/ Everett Turner

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: Delta Mining, Incorporated
Operator

Case No. 2312

August 17, 1972

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE ..... PROPOSED ORDER OF ASSESSMENT DATED April 11, 1972 DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

/s/ Everett Turner
ASSESSMENT OFFICER



UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-03248-0

IN THE MATTER OF:

Delta Mining, Incorporated Re: Mine:: Delta No. 1
Case No: 2312

Stonycreek Twp, Somerset County, Pennsylvania

*PROPOSED ORDER OF ASSESSMENT*

The above-captioned matter having come on the for consideration and consideration having been given to all available information, including the operator's history of previous violation, the appropriateness of the proposed assessment to the size of the business of the operator charged, whether the operator was negligent, the effect of the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged:

it is hereby ordered that Delta Mining, Incorporated be and the same is hereby assessed a civil penalty in the amount of three hundred seventy-five dollars ($375.00) for the following violation:

| Violation No: | Date Issued: | Violation: | Assessment: |
|---|---|---|---|
| 1 JWH | 01-24-72 | 75.313 | $55.00 |
| 2 JWH | 01-24-72 | 75.504 | 80.00 |
| 3 JWH | 01-24-72 | 75.1600 | 30.00 |
| 4 JWH | 01-24-72 | 75.1714 | 60.00 |
| 1 JWH | 01-26-72 | 77.400 | 90.00 |
| 2 JWH | 01-26-72 | 77.204 | 60.00 |

Total Assessed Amount $375.00

Dated at Washington, D. C.
and entered as the Proposed
Order of Assessment
April 11, 1972.

/s/ Everett Turner
ASSESSMENT OFFICER

EXHIBIT "A"

*Morton* v. *Delta Mining, Inc.*
No. 72-857, W.D. Pa.

ANSWER

Delta Mining, Inc., Defendant in the above-captioned case, answers the Complaint herein as hereinafter set forth in separate Defenses. In addition, and pursuant to Section 109(a)(4) of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter the Act or Coal Act), Defendant demands a de novo trial on all relevant issues and requests that all disputed issues of fact be submitted to a jury.

First Defense

1. Defendant denies each and every allegation in the Complaint except as hereinafter specifically admitted.

2. In answer to paragraphs 1 and 2 of the Complaint, Defendant admits that Plaintiff seeks to enforce a purported civil penalty assessment order purportedly issued under the Coal Act, but Defendant denies that jurisdiction of the action is properly conferred upon the Court as alleged in paragraph 2 because such purported order was illegally and improperly issued.

3. Defendant admits paragraph 3 of the Complaint.

4. In answer to paragraph 4 of the Complaint, Defendant admits that Exhibit A, referred to in such paragraph, is attached to the complaint, but Defendant denies all other allegations in said paragraph 4 of the Complaint.

5. Defendant denies all of paragraph 5 of the Complaint, except that Defendant admits the purported assessment order has not been vacated, modified, reversed, or withdrawn.

6. Defendant denies all of paragraph 6, except that Defendant admits it has refused to pay the purported civil penalty.

Second Defense

7. Defendant repeats each allegation set forth hereinabove.

8. Defendant avers that the Court does not have jurisdiction to enforce the purported order of assessment or to require Defendant to submit to an expensive, lengthy



trial on said order, because the purported order mentioned in the Complaint was illegally and improperly assessed in violation of Defendant's rights under the Coal Act.

9. The illegality and impropriety of the said order arises from the fact that the assessment procedure leading to the order was not in conformity with the Coal Act which provides that—

> (a) "In determining the amount of the penalty the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation." (Sec. 109(a)(1) of Act); and
>
> (b) "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing. . ."
> (Sec. 109(a)(3) of Act.)

10. Defendant avers that Plaintiff could not possibly have complied with Section 109(a)(1) of the Act because the purported assessments were made in accordance with the following minimum penalty schedule.

"Appendix A

Guidelines for Assessment of Penalties

| Type of Violation | Penalty Range |
|---|---|
| 1. Mine Operators: | |
| A. Imminent Danger Withdrawal Orders | $5,000-$10,000 |
| B. Other Withdrawal Orders | $1,000-$5,000 |
| C. Serious Violations | $ 100-$1,000 |
| D. Nonserious violations | $ 25-$500 |
| 2. Miners: | |
| Smoking or carrying of smoking materials matches, or lighters | $ 25-$250 |

Note: Consideration of all relevant circumstances in the case of a particular violation may warrant the

Assessment Officer's proposing a civil penalty in an amount more than or less than the range set forth above."
(Federal Register, Vol. 36, No. 11-Saturday, January 16, 1971)

Defendant further avers that it submitted a substantial amount of data to show a lower assessment was required by the six statutory standards, but Plaintiff's agents ignored such data stating that the assessment policies prohibited deviation from the penalty schedule. The said penalty schedule is illegal, and a penalty assessed thereunder is illegal, because its structure is such that it contains an inherent prohibition against the logical application of the six statutory standards, all of which is evidenced by Plaintiff's recent abolition and termination of use of such penalty schedule.

11. Defendant further avers that the regulations under which the purported orders were issued prohibited Defendant from having a hearing prior to the assessment of the purported penalty, although the right to such hearing is guaranteed by Section 109(a)(3) of the Coal Act. In fact such regulations forced Defendant to participate in a lengthy, expensive assessment procedure which is not in conformity with the Coal Act, and which is violative of Defendant's constitutional rights to due process.

12. As a further reason why the Court lacks jurisdiction to enforce the purported orders, Defendant avers that the so-called "Certification of Record, Plaintiff's Exhibit A, does not constitute an adequate record within the meaning of the provisions of 109(a)(4) of the Act which require the Plaintiff to certify and file with the Court "the record upon which such order sought to be enforced was issued". The Coal Act expressly provides that the Court shall not have jurisdiction until such record is filed with the Court.

Third Defense

13. Defendant repeats each allegation set forth hereinabove.

14. Defendant avers that the so-called "Certification of Record" is not in compliance with the Coal Act and is violative of Defendant's substantive and procedural due process rights under the Fifth Amendment to the Constitution of the United States in that—



(a) The findings of violations and amounts of penalties therein were made and determined ex parte, on the basis of the unsworn testimony of coal mine inspectors, and without Defendant having opportunity to submit interrogatories to or cross-examine such inspectors:

(b) The findings of violations and amounts of penalties therein were made and determined without any consideration being given to a vast amount of evidence submitted by Defendant to show that in most instances the alleged violations did not occur at all, did not occur because of fault by the Defendant, or did not constitute a significant mining hazard; and

(c) The finding of violations and amounts of penalties therein were made and determined arbitrarily and the Secretary's decisions do not adequately show the evidenciary basis for the findings of violations and penalty amounts or the manner by which such findings and penalty amounts were made and determined as required by the Act.

15. Defendant further alleges that the purported findings of violations and penalty assessment order, signed Everett Turner, Assessment Officer, and included in Exhibit A, are illegal, null, and void, because Section 109 (a)(3) of the Act requires that such findings and orders shall be made by the Secretary of Interior.

Fourth Defense

16. Defendant repeats each allegation set forth hereinabove.

17. Defendant denies each and every alleged violation of or under the Coal Act which constitute the basis of the said purported civil penalty assessment order and, further, Defendant demands strict proof of each and every such alleged violation underlying the purported order.

WHEREFORE, Defendant prays this Court to enter a judgment against Plaintiff dismissing the Complaint and awarding costs to Defendant.

[Filed November 27, 1972]

*Morton* v. *Delta Mining, Inc.*
No. 72-857, W.D. Pa.

ORDER

AND NOW, January 5, 1973, a motion to transfer the within action to the Middle District of Pennsylvania having been filed and it having come to the attention of this court for the first time that another and similar action is pending here against a corporation owned by the same people which has the same officers (Rogers C. B. Morton, Secretary of Interior, v. G.M.W. Coal Company, Inc., Civil Action No. 72-890),

AND it appearing that the action at No. 72-890 has been assigned to Judge Wallace S. Gourley who has been presented with a motion this date to transfer that case to the Middle District of Pennsylvania.

AND it appearing that both complaints seek to collect civil penalties under the Federal Coal Mine, Health and Safety Act of 1969 (30 U.S.C. 801 et seq.) and that the main office of Delta Mining Inc. is also the main office of G. M. W. Coal Company, Inc., and that the same people operate both companies and that the same attorneys represent both companies,

AND it appearing that both actions should be transferred or retained as the justice of the matter finally appears,

NOW THEREFORE, the within action is reassigned to Judge Wallace S. Gourley for all purposes.

/s/ Barron P. McCune
United States District Judge



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | |
|---|---|
| ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior, *Plaintiff*, v. G. M. W. COAL COMPANY, INC., *Defendant*. | Civil Action No. 72-890 |
| ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior, *Plaintiff*, v. DELTA MINING, INC., *Defendant*. | Civil Action No. 72-857 |

MEMORANDUM ORDER

AND NOW, this 16th day of January, 1973, after full and complete hearing, Motion to Transfer the within proceedings to the United States District Court for the Middle District of Pennsylvania is denied, and all previous orders entered by the court in each of said proceedings relative to the procedure to be followed in preparation for trial are vacated.

IT IS FURTHER ORDERED that the above proceedings are consolidated for trial.

Counsel for the United States shall make available for deposition on or before January 30, 1973, such persons as the defendant might request. The parties are directed to confer and consult, and enter into a written stipulation as to all facts not in dispute and interchange all exhibits on or before February 12, 1972, and the proceedings are fixed for trial on the 14th day of February, 1973, at 10:00 a.m., before this member of the Court, in Courtroom No. 2.

The Court Reporter is directed to transcribe the hearing held this date at the joint expense of the parties and file the same in the office of the Clerk of Court.

/s/ Wallace S. Gourley
Senior District Judge



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | |
|---|---|
| ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior,<br>v.<br>G. M. W. COAL COMPANY, INC., | Civil Action No. 72-890 |
| ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior,<br>v.<br>DELTA MINING, INC., | Civil Action No. 72-857 |

ORDER

AND NOW, this 24th day of January, 1973, in view of the demand the jury trial contained in the answers of defendants in the above captioned cases which have been consolidated for trial, the Order entered on January 16, 1973, setting the proceedings for trial on February 14, 1973, is hereby modified and changed so that on February 14, 1973, a pretrial of the actions will be conducted on said date at 10 A.M. Counsel shall comply in every other respect with the prior order requiring a stipulation of facts not in dispute to be filed on or before February 12, 1973.

/s/ Wallace S. Gourley
Senior District Judge

IN THE UNITED STATES COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior,
*Plaintiff,*
v.
G. M. W. COAL COMPANY, INC.,
*Defendant.*
Civil Action No. 72-890

ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior,
*Plaintiff,*
v.
DELTA MINING, INC.,
*Defendant.*
Civil Action No. 72-857

JOINT STIPULATION OF FACTS

1. G. M. & W. Coal Company, Inc., is the owner and operator of G. M. & W. Coal Company, Inc., Grove No. 1 Mine (hereinafter "Grove No. 1 Mine"), an underground bituminous coal mine located in the upper Kittanning coal bed, Jennerstown, Somerset County, Pennsylvania.

2. G. M. & W. Coal Company, Inc., Grove No. 1 Mine, and every miner therein is subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (hereinafter "Act").

3. Delta Mining, Inc. is the owner and operator of Delta Mining, Inc., Delta No. 1 Mine (hereinafter "Delta No. 1 Mine"), an underground bituminous coal mine located in the lower Kittanning coal bed, Stonycreek Township, Somerset County, Pennsylvania.

4. Delta Mining, Inc., Delta No. 1 Mine, and every miner therein is subject to the provisions of the Act.

5. Authorized representatives of the Secretary of the Interior (hereinafter "Inspectors") made inspections of Grove No. 1 Mine pursuant to Section 103(a) of the Act,



30 U.S.C. § 813(a), on May 11, 1971, September 14, 1971, November 17, 1971, November 24, 1971, and December 1, 1971. On the dates of said inspections, the Inspectors issued to and served upon Grove No. 1 Mine Notices of Violation pursuant to Section 104(b) of the Act, 30 U.S.C. § 814(b), and/or Order of Withdrawal pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a), a list of which is attached to and made a part of the Complaint filed herein. Additionally, on June 15, 1971, August 27, 1971, September 7, 1971, and October 26, 1971, Inspectors issued to and served upon said operator Notices of Violation pursuant to Section 104(b) of the Act.

6. An Inspector made inspections of Delta No. 1 Mine pursuant to Section 103(a) of the Act, 30 U.S.C. § 813(a), on January 24, 1972, and January 26, 1972. On the dates of said inspections, the Inspector issued to and served upon Delta No. 1 Mine Notices of Violation pursuant to Section 104(b) of the Act, a list which is attached to and made a part of the Complaint filed herein.

7. Grove No. 1 Mine is located in a seam of coal below the water table. In April, 1972, said mine employed approximately 52 employees underground and produced approximately 1600 tons of coal per day on three production shifts.

8. Delta No. 1 Mine was opened on or about November 26, 1971. In January, 1972, said mine employed approximately twelve underground employees and produced approximately 500 tons of coal per day on two production shifts.

/s/ Alexander L. McNaugher
Assistant U.S. Attorney

/s/ I. Avrum Fingeret
Trial Attorney for Plaintiff

/s/ Frederick R. Blackwell
Attorney for Defendants

/s/ Thomas J. MacBride
Attorney for Defendants

/s/ Franklyn E. Conflenti
Cauley, Birsic & Conflenti
Attorneys for Defendants

Approved this 14th day of February 1973 order to be filed.

Wallace S. Gourley

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | |
|---|---|
| ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior, v. G. M. W. COAL COMPANY, INC., | Civil Action No. 72-890 |
| ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior, v. DELTA MINING, INC. | Civil Action No. 72-857 |

## DEFENDANTS' NOTICE OF AND MOTION FOR JUDGMENT ON THE PLEADINGS

### Notice

Please Take Notice that the undersigned will bring the within Motion on for hearing before the U. S. District Court for the Western District of Pennsylvania, U. S. Courthouse and Postoffice Building, Pittsburgh, Pennsylvania, on the 13th day of February, 1973, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

### Motion

Defendants in the above captioned cases move for Judgment on the Pleadings on the grounds that the procedures and methods by which the herein penalties were assessed render such penalties illegal, null, and void, and hence, their enforcement by this Court would be violative of Defendants' rights of substantive and procedural due process guaranteed by the Fifth Amendment of the Constitution of the United States. The Motion is based upon the pleadings, and the pertinent Regulations of the Department of the Interior which are contained in the Appendix annexed hereto and which are properly before this Court as a matter of Judicial Notice of the Official acts of a United States Administrative Agency.



The specific grounds of the Motion are that Plaintiff and his agents have violated Defendant's constitutionally protected substantive and procedural due process rights in that Plaintiff has—

1) Deprived Defendants of the pre-assessment hearing guaranteed by § 109(a)(3) of the Act;

2) Deprived Defendants of the right guaranteed by § 109(a)(3) of the Act to have a pre-assessment determination of the Plaintiff "by decision incorporating his findings of fact therein, that a violation did occur, and the amount of penalty which is warranted";

3) Forced Defendants to participate in an illegal, elaborate, and cumbersome protest procedure which is not authorized by the Act, and which in fact was expressly rejected by the Congress; and

4) Used unpublished procedures to make the herein assessment orders the purported "Final Order of the Secretary", in violation of his own regulations which require him to initiate an adjudicatory proceeding to assess the herein penalties.

Counsel's consultations with the U. S. Attorney have not resolved the matters covered by this Motion.

[Filed February 13, 1973]

*Morton* v. *Delta Mining, Inc.*

No. 72-857, W.D. Pa.

## TRANSCRIPT OF PRETRIAL CONFERENCE

Pretrial Conference commencing at 11:08 a.m. on Wednesday, February 14, 1973, in the United States District Court, Pittsburgh, Pennsylvania, before the Honorable Wallace S. Gourley.

Appearances:

On behalf of the Plaintiff:

Alex L. McNaugher,
*Assistant U.S. Attorney*

I. Avrum Fingeret, Esquire
*Department of Interior*

Robert L. Teagan, Esquire
*Department of Justice*

On behalf of the Defendant:

Frederick R. Blackwell, Esquire

[2] THE COURT: Good morning, gentlemen.

This is the time that the Court fixed for final pretrial hearing of the consolidated action 72-857 and 72-890.

The Court has been advised by its Administrative Assistant that on February 13, which was yesterday, the defendant filed with the Court a motion for judgment on the pleadings.

You may proceed with your argument.

MR. MCNAUGHER: If the Court please, I would like to move for the admission of Attorney I. Avrum Fingeret of the Department of the Interior and Attorney Robert L. Teagan of the Department of Justice. Mr. Fingeret will be trying this case.

THE COURT: Your motion in each instance will be granted.

MR. MCNAUGHER: Mr. Blackwell has asked me to move for his admission if he has not already been so admitted.

THE COURT: The motion will be granted.

MR. TEAGAN: Your Honor, with regard to the motion that was filed by the respondent yesterday afternoon, counsel



for the government was only made aware of that motion late yesterday.

[3] THE COURT: I want to see if there are any disputed questions of fact. If there are, it is impossible for the Court to grant it. That is why I want to hear the defendant. You will know if there are any disputed questions of fact after his argument.

The defendant may proceed.

MR. BLACKWELL: I beg your pardon, Your Honor, did you wish——

THE COURT: The defendant presented to the Court on February 13—yesterday at 10:05 a.m. the defendants' notice of and motion for judgment on the pleadings; I will now hear your argument.

MR. BLACKWELL: Your Honor, before proceeding——

THE COURT: If there are any disputed questions of fact, I cannot grant your motion. I want to hear your argument. The government will know what you are saying and they will tell me whether there are any disputed questions of fact. If there are, I will deny your motion.

MR. BLACKWELL: In previous consultations with the government attorneys, I understand that they wish to exercise their rights to have five days within which to brief a reply.

[4] THE COURT: They don't need one. I want to know if there are any disputed questions of fact. If there are, I will automatically deny your motion from the bench. I am not going to delay this case any longer. It is going to be tried in the next couple of weeks.

MR. FINGERET: Do you want to present your facts? Then we will respond.

THE COURT: Whoever represents the defendant should be heard. The government doesn't run this Court; I run it.

MR. BLACKWELL: Your Honor, before proceeding with the motion, I would like to address the Court on another question, with the Court's leave. I call attention to the proceeding before this Court, to the transcript of the proceeding before this Court on defendant's motion for a change of venue that was held on January 16, 1973.

With the Court's leave, I would have incorporated by reference pages of that transcript—I would not take the Court's time by reading it—Page 11——

THE COURT: I gave the matter reflected judgment. I denied your motion and I don't intend to change my order. [5] MR. BLACKWELL: I am speaking now not for the motion on transfer but on a new matter that I wish to raise with the Court this morning, after I have laid the foundation.

Page 11, Page 18, Page 19, Page 20, Page 21 and Page 22 of that transcript and I call attention to two particular passages in that transcript which I will read to the Court:

I am quoting the Court, "Get me my docket book; I will fix it for trial right now. We have something to do so let's get it done."

"MR. BLACKWELL: Your Honor, I have in mind a motion for summary judgment after these depositions."

"THE COURT: If the government says that you have violated a law and you say that you haven't, I cannot grant you a motion for summary judgment. I know that you big law firms file all these motions; I did the same thing myself."

Close quote.

On Page 21 of the same transcript, I stated to the Court—we were discussing the legal issues:

"MR. BLACKWELL: Well, my view of it, Your Honor, is if we are right on the assessment [6] procedure being illegal, there should not be a trial. This should be resolved in the motion that I was——"

There is an unfinished sentence.

"THE COURT: I deny such a motion. I am going to hear the whole case as I have told you on the 14th day of February, 1973, at 10:00 a.m."

I submit to the Court that the statements made by the Court that is reflected in that transcript of the proceeding of January 16, 1973, conclusively shows that this Court has prejudged the defendant's motion.

THE COURT: That is an absolute misstatement of the facts.

MR. BLACKWELL: I request the Court to withdraw from hearing this motion.

THE COURT: Denied.

MR. BLACKWELL: I request leave to submit a written motion on the point subsequently.

THE COURT: You may submit a written motion and I will deny it.

MR. BLACKWELL: Your Honor, if I may, at the time



being, request leave to speak on a narrow ground of the motion just in respect as to whether there are any material issues of fact. If the Court decides that there are no material issues of fact, [7] then I would request leave to proceed thereafter to argue the legal issues raised by the motion.

THE COURT: You may proceed.

MR. BLACKWELL: The defendant's motion on the pleadings is based on the fact that the procedures and methods by which the herein penalties were assessed render such penalties illegal, null, and void, and, hence, their enforcement by this Court would be violative of defendants' rights of substantive and procedural due process guaranteed by the Fifth Amendment of the Constitution of the United States. The motion is based upon the pleadings, and the pertinent Regulations of the Department of the Interior which are contained in the Appendix annexed hereto and which are properly before this Court as a matter of Judicial Notice of the Official acts of a United States Administrative Agency.

The specific grounds of the Motion are that plaintiff and his agents have violated defendant's constitutionally protected substantive and procedural due process rights in that plaintiff has:

1) Deprived defendants of the pre-assessment hearing guaranteed by Section 109(a)(3) of the Act;

2) Deprived defendants of the right [8] guaranteed by Section 109(a)(3) of the Act to have a pre-assessment determination of the plaintiff, quote, "by decision incorporating his findings of fact therein, that a violation did occur, and the amount of penalty which is warranted", close quote;

3) Forced defendants to participate in an illegal, elaborate, and cumbersome protest procedure which is not authorized by the Act, and which in fact was expressly rejected by the Congress;

4) Used unpublished procedures to make the herein assessment orders the purported Final Order of the Secretary, in violation of his own regulations which require him to initiate an adjudicatory proceeding to assess the herein penalties."

I call attention to the fact that the Appendix to the motion is made up of the pertinent Regulations which are

referred to in our brief, made up of one letter written by the assessment officer. I submit that in that Appendix, the Regulations we do not raise any issues of disputed facts with the government. On that statement, I would suspend until it is determined whether there are issues of disputed fact.

Thank you very much, Your Honor.

[9] THE COURT: The reason that the court originally said that this case would be fixed for trial on February 14, I was laboring under the assumption that it was a non-jury case. It was called to my attention at the time that the matter was last heard that a jury trial was requested. That was the reason that I changed it from a hearing to a final pretrial,

Is it true that you requested a jury trial?

MR. BLACKWELL: Yes, the defendants requested a jury trial.

THE COURT: It should be explained that that is why the previous record shows that the Court had fixed this for final hearing on this day. I converted it from a final hearing to a pretrial.

Do you men understand that?

MR. FINGERET: Yes, we so understand that.

THE COURT: You understood that also, Mr. Blackwell?

MR. BLACKWELL: Yes.

THE COURT: Your offices are where, Mr. Blackwell?

MR. BLACKWELL: In Washington, D. C., [10] Your Honor.

THE COURT: Who is your local counsel?

MR. BLACKWELL: Cauley, Birsic and Conflenti, Mr. Frank Conflenti.

THE COURT: As I told you before, we notify local counsel and it is up to local counsel to get in touch with you.

MR. BLACKWELL: He got in touch with me.

THE COURT: I will approve the joint stipulation of fact which has been presented to the Court. The government may state for the record what your case is about, the same as you would if you were opening before a jury. Tell me what your case is about.

MR. FINGERET: If it please the Court, it is the government's contention that we have filed a petition to enforce a final order of assessment of civil penalty for violations of the Federal Coalmine Health and Safety Act of 1969 against two defendants in this consolidated action.



It is further the government's position that there are issues to be placed before a jury at the trial of this matter, as has been requested by the [11] defendant's here.

THE COURT: You may use the rostrum there if you wish.

MR. FINGERET: Thank you, sir.

THE COURT: What do you say the facts are?

MR. FINGERET: It is our contention that the fact of violation has already been established in the final order of the Secretary.

THE COURT: Does the Court try it de novo before a jury?

MR. FINGERET: There is a matter of the interpretation of the statute as to what de novo actually means.

THE COURT: De novo is that you present your case before a judge and a jury; they hear the defense; the judge charges the jury and the jury decides, under the Court's direction, whether or not there has or has not been a violation.

MR. FINGERET: The question that we have today that we are presenting to the Court is that de novo goes to the amount of the penalty which has been assessed and not to the fact of violation alone. There are three sections of the Act which must be read together. In terms of the Act, they are Sections [12] 105, 106 and 109. As far as US Code is concerned, it is Section 815, 816 and 819.

THE COURT: Of what?

MR. FINGERET: Of US Code, Title 30.

THE COURT: Let's take one defendant at a time.

What do you claim that Delta Mining, Inc. did wrong in Civil Action 72-857?

MR. FINGERET: We are contending, Your Honor, that this has already been determined, that he violated the statute.

THE COURT: Tell me what you say they did wrong?

MR. FINGERET: G. M. W., which is another one of the defendants——

THE COURT: I asked you, sir, if you would proceed with 72-857; tell me what you say they did wrong, what the defendant did wrong?

MR. FINGERET: What we have claimed in this action, Your Honor, is that the defendant has not paid the penalty which was assessed by the final order of the Secretary of the Interior.

THE COURT: I want to know what you claim the defendant did wrong that brought about the imposition of the penalty.

[13] MR. FINGERET: This is Delta Mining—one violation

of the Act—a methane monitor approved as reliable by the Secretary—meaning the Secretary of the Interior—was not installed on a continuous miner in the main section of Delta No. 1 Mine. This was observed by the Federal Coalmine Inspector on January 24, 1972.

Another violation—also, these are all January 24, 1972—conditions or practices observed by an authorized representative of the Secretary of the Interior——

THE COURT: Who?

MR. FINGERET: In this particular case, it was James W. Hawkins who was the Inspector, duly authorized representative. The hose conduit used to protect the wires leading from the junction box of the left cutting head motor was broken on the continuous miner.

Another violation, telephone service was not provided from the surface to the underground working section.

Another violation, the self-rescue device approved by the Secretary was not made available for each underground workman.

The belt chain drive at the top of the [14] storage line was not guarded to prevent persons from coming in contact with the chain drive. The opening around the belt drive on the motor at the top of the storage bin was not covered to prevent persons from falling in the bin.

Those are the violations we say have occurred.

THE COURT: What did the government do after these violations were determined?

MR. FINGERET: Procedurally, Your Honor, the Inspector issues a notice of violation.

THE COURT: I think you have to prove your case before a judge and a jury. What did you do afterwards?

MR. FINGERET: After the Inspector issued a notice of violation, a copy of this notice of violation was sent to the Bureau of Mines in Washington, to the Assessment Officer. The Assessment Officer, in accordance with regulations promulgated by the Secretary pursuant to the Federal Coalmine Health and Safety Act, reviewed the alleged violation. At this particular time, he determined a violation had occurred and under his jurisdiction at this time, applied certain criteria required by Section 109 of the Act and issued a proposed order of assessment to [15] the operator.

The operator then protested the proposed assessment.



THE COURT: Up to that time, it was based on reports of the Inspector?

MR. FINGERET: That is right.

THE COURT: Proceed.

MR. FINGERET: Now, the operator did protest these proposed orders of assessment in writing. The Assessment Officer reviewed the protest.

THE COURT: Did he have a hearing?

MR. FINGERET: No, this is only a proposed order of assessment at this time, Your Honor.

THE COURT: You mean after the protest was filed?

MR. FINGERET: It was proposed before the protest was filed in accordance with the regulations that is Title 30, Federal Code of Regulations, Part 100——

THE COURT: What happened after the protest was filed?

MR. FINGERET: A second proposed order of assessment was issued by the Assessment Officer.

THE COURT: Based on what facts?

[16] MR. FINGERET: Based upon the protest and information supplied by the operator in his protest.

In other words, he reviewed all the descriptions of the violations, the alleged violations, and issued a proposed order of assessment—if you will bear with me, Your Honor, I am trying to see if he did amend it or reissue it.

The proposed order was affirmed. The Assessment Officer did review the protest and determined that the proposed assessment at this time should not be amended or lowered and they should remain the same.

THE COURT: Then what happened?

MR. FINGERET: This reissued proposed order of assessment was sent to the operator. The operators, at this time, did nothing further in accordance with the Regulations. The affirmed order of assessment did tell him that he had so many days from the receipt of this particular document to request hearing and adjudication pursuant to the Regulations. At which time, he had the opportunity to go through the whole administrative procedure, a public hearing on the record, before a qualified, approved law judge and have the fact of violation and [17] the amount of penalty, civil penalty, determined absolutely de novo.

THE COURT: It was given for a hearing if the defendant wanted it?

MR. FINGERET: That is right. He did have that opportunity.

THE COURT: What happened?

MR. FINGERET: At this particular time, the defendant did not avail himself of that opportunity for public hearing but waived his public hearing in accordance with the Regulations by failing to do anything further.

In accordance with the Regulations, the proposed order of assessment then became the final order of the Secretary. Since this final order was not paid under Section 109(a)(4) of the Act—which is Section 819(a)(4) of the Act, Title 30, USC—the matter was forwarded to the Department of Justice where it was filed in this Court. A petition was filed to enforce the final order of the Secretary.

THE COURT: Mr. Blackwell, you state your defense to the action that your adversary counsel has expressed in Civil Action 72-857.

MR. BLACKWELL: May it please the Court, exactly the contrary that has been stated by [18] the government is required by the Statute.

Section 109(a)(4) of the Statute clearly and in unequivocal terms provides that the penalty enforcement proceeding brought by the Secretary of the Interior shall be tried de novo. Statutory language is clear that de novo——

THE COURT: Well, your adversary says that you were given the right to a de novo hearing but you didn't accept it.

MR. BLACKWELL: That was at the phase of development at which the administrative hearing was involved. The de novo trial in the District Court is an all together different proceeding. The administrative proceeding at the Bureau on penalties and the Courtroom trial are two separate proceedings; they are not related.

THE COURT: Did you or did you not elect to take the opportunity to have the trial that you were afforded?

MR. BLACKWELL: Before the administrative——

THE COURT: You heard your adversary speak for the record; you heard what he said.

MR. BLACKWELL: No, we did not and if [19] I may refer to that in a minute, I would like to address further comments on our right to a de novo trial before this Court and our rights to submit fact issues, all facts in dispute, to the jury. We have exercised that right also.

THE COURT: You are going to be given that right.



MR. BLACKWELL: Well, the hearing rights——

THE COURT: They have to prove their case against you the way he has expressed himself and then you can offer your defense. I want to know what your defense is.

MR. BLACKWELL: Our defense is that in many cases, the violations as alleged did not in fact occur.

THE COURT: What evidence are you going to offer?

MR. BLACKWELL: If I may give you an example of one particular violation, Your Honor, in the Grove case, because I can speak more informatively——

THE COURT: You had better get your thinking straight. Whatever you say at pretrial in this Court is final and binding on you.

MR. BLACKWELL: I understand.

[20] THE COURT: You may not offer anything in trial that is in variance with what you offer at pretrial unless the trial judge gives you that right and privilege to prevent manifest[in]g justice. So, I am giving you the opportunity to state for the record your full and complete defense to the government's claim that you heard government's counsel express for this record.

MR. BLACKWELL: If Your Honor will indulge me a moment, I would like to get a paper.

THE COURT: You can have all the time you want.

I don't see how these cases can be consolidated. They are going to have to be tried separately; each one is different.

One can follow the other but I question the propriety of trying them together. We are bound to have different facts in one as evaluated with the other.

So, the order of consolidation, I think, was entered improperly.

MR. BLACKWELL: Your Honor, I am referring to a Defendant's Statement of Contested Facts which we are ready to file with the Court.

THE COURT: Sir, you have to orally [21] state for this record what your defense is to what the government counsel has just stated.

MR. BLACKWELL: The defendants will show that in many instances the alleged violations of health and safety standards did not occur at all.

THE COURT: What do you say didn't occur? Many doesn't mean anything.

MR. BLACKWELL: Well, in both consolidated actions, they have one, two——

THE COURT: Sir, I am only talking about Civil Action 72-857. I limited the government to that and I am going to limit you to that.

These cases cannot be consolidated and tried at the same time.

MR. BLACKWELL: Our defense there, Your Honor, is that they did not occur because of fault by the defendants. In some cases where they may have occurred, they did not create any significant health or safety hazards.

We submit, in addition, that the order which has been filed with the complaint is not the final order of the Secretary, that it did not come into being in conformity with the Secretary's own Regulations.

Now, the controlling Regulations provide [22] that the proposed order of assessment, which is what counsel for the government described here this morning, results in a, quote, final assessment order of the Secretary in only two instances. The first instance is when a person subject to a proposed assessment order defaults in the protest procedures. The government attorney has brought out that these defendants did protest. There is no default in the protest procedure.

The second instance, when it becomes a final order, is when the amended reissued order of the Assessment Officer is accepted by the persons subject to the order. In this case, defendants did not accept the orders. We contend that they are not final orders and they are not ripe for enforcement before this Court.

The hearing opportunity to which the government attorney referred is not the hearing opportunity which the defendants were guaranteed by the statute. The opportunity that was offered was a post-assessment hearing opportunity.

The Statute clearly provides that there shall be a pre-assessment hearing opportunity. Section 109(a)(3) of the Act, I quote, a civil penalty shall be assessed by the Secretary only after— [23] repeating, only after—the person charged with the violation under this Act has been given an opportunity for a public hearing and the Secretary has determined by decision incorporating his findings of fact therein that a violation did occur.

This provision in the Statute has not been complied with



by the plaintiff, by the Department of the Interior and the statement made this morning by the plaintiff's attorney validates that fact, that they did not comply with it. The admission made by the government's attorney was that a proposed order of assessment, with a specific dollar figure, was first issued. Thereafter, and subsequent to a written protest which was made in a context which a penalty had already been assessed, not until after that protest by the defendant had been filed in writing was the defendant offered an opportunity for a hearing. That offer was made in the Assessment Officer's letter in which he sends out his final order of assessment stating that if you do not accept this within fifteen days of receipt, if you do not request a hearing within fifteen days from the receipt of this offer, then this shall become the final assessment order of the Secretary of the Interior.

We submit that that action manifested [24] by that letter of the Assessment Officer, which is part of this record, is violative of the statute. It usurps completely the defendants due process rights to have a hearing prior to the assessment. It deprives the defendants of substantive due process because it is attempting to take the money of the defendants without the hearing procedures, which have been clearly provided by the Statute, having been abided by. The Bureau, the Department of the Interior, has just turned upside down the statutory provision which clearly says that the civil penalties shall be assessed only after the hearing.

In these cases, they assessed a penalty and then said that you can have a hearing within fifteen days. Otherwise, these become final. In addition to that, the fact of the denial of the prehearing assessment in offering only a post-assessment opportunity, the Interior Department did not follow its own Regulations which prescribe how the Assessment Officer's penalty order shall become the final order of the Secretary in the sense that the final order of the Secretary is then ripe to be brought to this Court to seek its power in enforcing the penalty.

The Bureau's own Regulation in effect during the time that all the penalties in both actions [25] were assessed said that there are two ways that the Assessment Officer's proposed penalty assessment shall become the final assessment order of the Secretary of the Interior:

1. If the defendants default in the protest procedure.

If, after the Assessment Officer sends the proposal to a mine operator, under the Regulations, if that mine operator does not make a response, does not submit a protest within fifteen days, then the Regulations provide that in that case, the order which had been previously submitted to the operator shall become the final assessment order of the Secretary.

Now, when that happens, the Department of the Interior could bring to this Court a final assessment which is potentially ripe for enforcement by this Court. We don't have that case here at all. That is not involved here at all.

The second instance in which a proposed assessment order of the Assessment Officer can become final is:

1. If the operator accepts it—well, that is not number one; let me clarify that.

The only other instance in which an Assessment Officer's order can become final is if the [26] operator accepts it. The controlling regulation clearly provides that the penalty is issued—I would like to read the precise text. These are the controlling regulations under which these penalties were assessed. I am quoting from Part 100, Title 30, Chapter 1, Subchapter O, Code of Federal Regulations effective January 16, 1971. The pertinent provisions are in Section 100.4(e) of that Section is where the default provision is contained. The other provision and the provision that is pertinent here is contained in Paragraph H, and I quote:

"The operator or miner charged shall have 15 working days from the date of receipt of such amended or reissued order to accept . . ." to accept ". . . the amended reissued order. Whereupon, it shall become the final assessment order of the Secretary or to request formal adjudication with opportunity for hearing."

Now, the only way under that paragraph that the assessment orders in this case could have become final would have been in the case of the defendant's acceptance. That did not occur. These defendants expressly rejected—and there is no provision in the Regulation that not asking for a hearing gives the Assessment Officer power to declare [27] his assessment order the final order of the Secretary.

In this case, the Secretary of the Interior did not follow his own regulations. Under this Regulation, in the circumstances of this case, in which the defendants did not accept the proposed orders of the Assessment Officer, the only



way and the proper way and the legal way that the Interior Department could have brought to this Court final assessment orders, which are legal and valid and ripe for enforcement by this Court, would have been for the Interior Department to initiate an adjudicatory proceeding, and to bring them to finality that way. It is not a fulfillment of the Interior Department's obligation under the clear provisions of its own language to tell the defendant that you can request a hearing within fifteen days if you choose. It is not legal and proper and authorized under the Department's own Regulations for the Department of the Interior to rid itself of its burden to take the initiative and say, "I am going to get rid of my problem by telling you to take the initiative". That is exactly what the Assessment Officer's order does when he sends it out. He had no authority. There is no regulatory or statutory authority for the Assessment Officer to declare these penalties the [28] final assessment orders in the way that it has happened in this case. It is pure and simple executive fiat and nothing else. It should not receive any support, aid or comfort from this Court.

The law is well settled by a host of authorities that an administrative agency must follow its own regulations in all instances and even in cases where the administrative agency, in absence of a regulation, could commit Act A. But when they put regulations on the book which imposes conditions on committing Act A, the Supreme Court Decisions time after time, the Circuit Court said that you put the regulations on the book and you have to follow them. I submit that that is one of the very critical issues in this case.

The Interior Department does not only not have a document which conclusively establishes facts of violations, they don't even bring a legally, viable instrument into this Court. They haven't followed their own regulations which tell them how an Interior Department order can be brought to such finality that it is then appropriate to come before this Court for enforcement. That is just one thing; that is just one of the legal deficiencies and illegal aspects of what the Interior Department has [29] brought to this Court and asked it to enforce against these defendants.

THE COURT: I am only talking about one case. Will you please keep your argument to Civil Action 72-857.

I have let you talk for twenty five minutes without interrupting and all I am interested in is Civil Action 72-857.

MR. BLACKWELL: In that case, all that I have said about their being illegal, not being properly brought to finality, the Interior Department's regulations, all that applies to this case.

THE COURT: The record will so reflect.

Now, the government's attorney in describing how these penalties were assessed made the statement that after the notice from the Inspector came to the Assessment Officer, that all of the procedures were followed and the assessment was then made. The Interior Department's own certification of records show——

MR. BLACKWELL: Excuse me, Your Honor. I cannot make that statement about this particular case. Their documents on citing the standards do appear to be in order on the Delta Mining case. So, [30] I cannot make that point.

In the Delta Mining case, as I stated, we were deprived of our statutory rights under Section 109(a)(3) to have an opportunity for a hearing before a penalty was assessed. We were denied the opportunity to have findings before a hearing was assessed and the Department did not follow its own Regulations in making them. We submit that they are not ripe and we have defenses on the facts of violation in addition to those legal issues which will be raised.

Thank you very much, Your Honor.

THE COURT: Is there anything else that government's counsel desires to say?

MR. TEAGAN: May I address a few comments to the Court?

THE COURT: You may have all the time you want, sir. This is a pretrial hearing and the purpose of it is for each of you lawyers to alert the other as to what you are going to establish at the time of trial.

Your name, sir?

MR. TEAGAN: My name is Teagan, sir, Robert Teagan.

Counsel, in his discussion of the [31] proposed order of assessment, has made what we consider to be a fatal misstatement. We talk about two orders. We talk about a proposed order of assessment and the Secretary's order. We have to draw a distinction here; it is a very obvious distinction and a vitally important distinction, Your Honor.



After a notice of violation is issued to a mine operator, that notice is sent to the Bureau of Mines. It goes to the Assessment Officer. He evaluates that and he issues what is called the proposed order of assessment. The proposed order of assessment is not an order of assessment. It is not an assessment. The proposed order of assessment is basically a vehicle by which the Bureau of Mines gets the proceeding under way.

It sends the proposed order to the respondent so that he may look at it, draw his own conclusions and make conclusions and any reasons therefore are known to the Bureau of Mines so that the Bureau of Mines will have all the information available that bear on the six criteria provided in Section 109(a)(1) of the Act.

I must affirm as strongly as I can that this is a proposed order of assessment. It is not an assessment. In the accompanying letter that is [32] sent to the mine operator, he is advised of his opportunity to protest this. If he does protest, presumably, he will provide information to the Assessment Officer for the Bureau of Mines which will reflect extremely importantly on each criteria that he must consider. In other words, it is an invitation to provide information.

If he does protest, and he does not like what the Assessment Officer does with the information, he may then—and he is advised of this—he may then request a formal adjudicatory hearing. At the time that he requests this hearing or at the time that he is given the opportunity to request this hearing, he has not been assessed a penalty. He has merely been told what the Bureau of Mines is thinking of and does he have any comments that he wants to make.

The day limitation on this fifteen days—may I make a comment on that? The Act provides that the mine operator shall be given an opportunity for a public hearing by a letter accompanying the proposed order of assessment. He is told of his opportunity. He is given an address to which he might write to request a hearing.

As my co-counsel said, if he requests [33] this hearing, the government is put to a full burden of proof in a de novo proceeding to prove the fact of violation and to introduce evidence bearing on what the appropriate penalty should be.

THE COURT: Present what evidence?

MR. TEAGAN: It is a full de novo hearing at the administrative level pursuant to 109(a)(3) of the Act whereby the government must introduce evidence to prove the violation and also to bear on what, if any, penalty should be assessed.

The time requirement that is stated in the proposed order or the accompanying letter thereto tells that he must reply within fifteen days, fifteen working days, which gives him three weeks to reply. If he fails to do so, it becomes the final order of the Secretary.

This has to be in there, Your Honor. He has to be given the opportunity and the opportunity must stop someplace. The government must draw the line to get these proceedings going, to expedite them. There are currently 2,000 cases pending in the US Attorney's Office and in the Courts which must be processed. And there are many times that number at the Bureau of Mines level. So, a time limitation must be drawn.

[34] Counsel for the respondent mentioned the two defenses that he wishes to bring out in this proceeding. One of them, that he didn't have fault, his client did not have fault. The second one is that none of these violations constitute a significant health or safety violation. If I may say to this Honorable Court, the Act provides in Section 109(a)(1) that the operator of a coal mine in which a violation occurs shall be assessed a civil penalty by the Secretary. It goes on further to say that in assessing a penalty, the Secretary shall consider fault and the importance or lack of importance of a violation. Therefore, that does not bear in any way whatsoever on the fact of the violation. That, Your Honor, is not a defense. Neither one of them is a defense to the fact of the violation.

One last thing may I bring to the attention of this Court: In the proceedings under Section 815, 816 or 105 and 106 of the Act, the mine operator is given the opportunity to challenge the fact of the violation at the administrative level before the Office of Hearings and Appeals of the Department of the Interior. If he isn't satisfied with the decision at that level, he may bring it to the Court of Appeals and have a full hearing of the [35] issue regarding the fact of violation.

In addition to that, when the government is put to its task of proving the violation, in the event that he requests



a formal hearing, we again must prove the fact of violation.

Under 109(a)(4), the provision which provides a de novo review in this Court, the Act specifically states that there shall be a de novo review on all issues except those that could have been decided under Section 816 of the Act. That is the Court of Appeals provision, the fact that the violation could have been adjudicated there, therefore, it cannot be again adjudicated. There were two opportunities at the administrative level before these proceedings to litigate this and the respondents failed to take advantage of these. He cannot again be given the opportunity to litigate the fact of the violation. If the de novo review was complete and did extend to that, it is submitted that the administrative procedure would be totally lacking in any substance whatsoever. It would be totally useless. It would probably tempt most mine operators to totally avoid the administrative level, come into Court and know well that we would have to prove our entire case here anyhow.

[36] For these reasons, Your Honor, the government submits that the defenses raised by the respondent are inadequate in their defense to this action.

THE COURT: Is there anything else you want to state?

This is still Civil Action 72-857. Please, don't repeat what you have already said.

MR. BLACKWELL: I would like to clarify the record on three comments made by the attorney for the government.

He stated that the defendant had a right to challenge the fact of violation. Under the review proceeding of the Act—105, I believe that is the Section—to take those all the way to the Circuit Court if we were not satisfied with the administrative hearing decision—that is not fact. That is absolutely inaccurate.

Under rulings, the administrative rulings by the Interior Department, once a notice of violation, once a condition covered by notice of violation has been abated—means corrected—the rulings of the administrative hearings of the appeals division have held that there is no right to review of that particular notice of violation, that [37] the matter can only be contested in a penalty proceeding.

Dismiss the defendant's contention of insignificance of the health and safety hazards, he says that this has no bearing. I submit to the Court that the Bureau's regu-

lations at the time of these penalty assessments contained express provisions for non-assessment penalties for a non-serious violation. So, that is very much at issue here.

On the position that the assessment order that was issued in this case were all proper and in conformity with the Statute and that it was not a final order until after there was an opportunity for a hearing is really a distinction without a difference. He spoke about the defendant's opportunity to submit protest. The fact is that the defendants were coerced by the regulations to participate in the protest procedure instead of following the Statute which gave the defendant an opportunity for a hearing as the first step in the sequence leading to the assessment of a penalty, they promulgated regulations that said you had to participate in this protest procedure. If you did not, then you were deemed to waive your right to an adjudicatory hearing. So, that is the way they forced us into the protest [38] proceeding.

And then to say that it is not really a penalty until after the fifteen days has expired is really just a thoroughly unrealistic view of how this whole administrative mechanism works because a dollar figure has come into existence, a penalty has been assessed. Under the procedures, these defendants were entitled to an opportunity for a hearing before the assessment of that penalty.

Thank you, Your Honor.

THE COURT: Have you interchanged all your exhibits?

MR. FINGERET: We have discussed——

THE COURT: I direct you to do it within five days of this date. Interchange all your exhibits and mark them. I don't want you in a situation where in a jury trial you proffer an exhibit to the Clerk of Courts to be marked. Mark them within the next five days, each of you. And each of you are to interchange your exhibits with one another.

I think that each of you has clearly set forth his position but if you want to talk some more, go ahead.

MR. FINGERET: For clarification of [39] the Court in what Mr. Blackwell has just raised, a few points referring to the Administrative Board of Mine Operations Appeal cases, in refuting the government's argument, I believe that a little clarification is essential.

In the first place, he said that if in a notice of violation issued under Section 104(b) of the Act—that is 814 USC



Title 30, there is no review under 105—the violation has been abated. This is true in as far as Mr. Blackwell has gone. But he has not gone far enough in accordance with the Regulations in the Act.

These Board Decisions do say that it is moot if the violations have been abated. Under the Act, under 105, in a notice of violation, the reasonableness of the time in which to abate is in issue. But on a notice of violation, an operator is given a certain length of time in which to abate a violation. The operator has a right to request an expedited hearing as to the reasonableness of time——

THE COURT: You men are going to get a hearing in this Court. I cannot dispose of these things with finality at a pretrial hearing. I am not going to do it.

Haven't you each stated your respective [40] positions for this record?

MR. FINGERET: We have stated our respective positions but Mr. Blackwell has raised legal issues which I do not feel that I, in good conscience, could let stand unrefuted unless we have the opportunity to brief them and to present to the Court——

THE COURT: What do you want to brief? I read this brief when it was presented to me yesterday. I am going to deny his motion and I am going to certify this for jury trial.

I am giving each of you men the opportunity to present what your position is for the time of trial.

MR. FINGERET: We feel that there are certain legal issues——

THE COURT: I am not going to dispose of them at pretrial. You are setting forth what they are. You will have a full blown trial. You will have the right and privilege to introduce all the evidence you want, all the legal arguments you want after your evidence has been presented. I think the procedure you have followed is consistent with law. With due deference to Mr. Blackwell's position, if I am wrong, an Appellate Court can tell [41] me so some day.

MR. FINGERET: The only issue I would like to raise, Your Honor, at this particular time, I cannot give a valid list of my witnesses because——

THE COURT: You have to prove your case de novo in this Court. If you don't do it, it will be dismissed.

MR. FINGERET: Again, we get back to the basic question of what is de novo.

THE COURT: De novo is to prove your whole case from the beginning.

MR. FINGERET: That is the Court's ruling on that?

THE COURT: That is right, sir; that is to each of you.

MR. FINGERET: I won't take any more of the Court's time then.

THE COURT: Just a minute. Each of you, within five days, will give the other the names and addresses of all your witnesses, within five days. It is going to be tried right from scratch, the whole way through.

As to each of you, I think the procedure you have followed is proper and the Court has [42] jurisdiction.

MR. FINGERET: In accordance with your ruling, it will be proving fact of violation from scratch?

THE COURT: That is right, sir. That includes any defense of the violation.

Now, what is your estimate of trial time?

MR. FINGERET: On that basis, Your Honor, I estimate a week and a half to two weeks.

THE COURT: Seven to ten days.

MR. FINGERET: Which case are we talking about; are we on Delta?

THE COURT: I am only talking about one case, Civil Action 72-857.

MR. FINGERET: On Delta, sir, I will need a maximum of two and a half days.

THE COURT: How much time do you want, Mr. Blackwell?

MR. BLACKWELL: I would like to begin the week of February 26.

THE COURT: I am not asking you when you are going to try it. I am asking how much time do you want.

MR. BLACKWELL: Excuse me, I misunder- [43] stood. I would agree with Mr. Fingeret's estimate of time.

THE COURT: He said he wanted two and a half.

MR. BLACKWELL: One day in addition.

THE COURT: Three to four days, estimate of trial time.

MR. FINGERET: That is correct, sir.

THE COURT: What are your settlement possibilities, good, fair or bad?

I don't want an argument; I just want to know what they are.



MR. FINGERET: I think they are very poor.

THE COURT: Is there anything else on Civil Action 72-857?

MR. FINGERET: No, sir.

THE COURT: Now, I direct this record to be transcribed at the joint expense of the parties with the original to be filed for the use of the trial judge. If anybody wants a copy, he can request it from the Reporter. Otherwise, one copy will be written and each of you are to pay half. If either or you want the record, you shall request it.

I assign this for trial during the [44] week of February 26 to the Honorable Herbert P. Sorg, a member of this Court, or as soon thereafter as he is available.

MR. BLACKWELL: Excuse me, Your Honor——

THE COURT: The trial will be before the Honorable Herbert P. Sorg, an associate member of this Court. I am satisfying you because you said that you didn't want me to try it; I will not try it.

You men should be able to proceed when you are notified by the Court.

These cases cannot be tried together; they are too involved and complex to labor a jury with two cases of this nature.

Civil Action 72-857 will be tried first and as soon thereafter as Judge Sorg is available, he will try Civil Action 72-890.

(Thereupon, the pretrial conference at Civil Action 72-857 was concluded.)

*Morton* v. *Delta Mining, Inc.*
No. 72-857, W.D. Pa.

ORDER

AND NOW, this 14th day of February, 1973, the immediate matter before the Court is a motion for summary judgment filed on behalf of the defendant. The Court has considered the motion, the briefs submitted by counsel, and the oral argument held this date, and said motion is denied.

It is further directed that the Order previously entered by the Court in which the within proceeding and Civil Action No. 72-890 were consolidated is hereby vacated because of the involved legal intricacies of the respective cases.

/s/ Wallace S Gourley
Senior District Judge



*Morton* v. *Delta Mining, Inc.*
No. 72-857, W.D. Pa.

ORDER

AND NOW, this 14th day of February, 1973, the within proceeding is hereby assigned to the Civil Jury List of the Honorable Herbert P. Sorg to be held for final trial the week of February 26, 1973, or as soon thereafter as the Court is available. Counsel shall exchange the list of witnesses to be called for trial and also mark and interchange all exhibits on or before February 21, 1973.

The Court reporter is directed to transcribe the record of the pretrial held at the joint expense of the parties and the original is to be filed in the office of the Clerk of Courts to be used by any member of this Court.

/s/ Wallace S Gourley
Senior District Judge

*Morton* v. *Delta Mining, Inc.*
No. 72-857, W.D. Pa.

ORDER

AND NOW, this 25th day of May, 1973, for the reasons set forth in the Memorandum filed this date in the case of *Rogers C. B. Morton, Secretary of the Interior, United States Department of the Interior vs. G.M.W. Coal Company, Inc.*, Civil Action No. 72-890,

IT IS ORDERED that judgment be entered in favor of the defendant and against the plaintiff in the above entitled case.

/s/ Herbert P. Sorg D.J.



*Morton* v. *Delta Mining, Inc.*
No. 72-857, W.D. Pa.

JUDGMENT

This action came on for (hearing) before the Court, Honorable HERBERT P. SORG, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that judgment be entered in favor of the defendant and against the plaintiff.

Judgment is hereby entered accordingly.

Dated at Pittsburgh, Pa., this 25th day of May, 1973.

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*Morton* v. *Delta Mining, Inc.*
No. 72-857, W.D. Pa.

NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals to the United States Court of Appeals for the Third Circuit from the judgment entered by Judge Herbert P. Sorg, District Judge, dated May 25, 1973.

Filed: July 24, 1973

*MORTON* v. *G.M.W. COAL COMPANY, INC.*
No. 72-890, W.D. Pa.

*Morton* v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

Docket Entries

| | |
|---|---|
| 1972 | |
| Oct. 20 | Complaint filed |
| Oct. 20 | Summons issued |
| Nov. 1 | Summons returned served on deft by cert mail return receipts dated 10/20/72. |
| Nov. 8 | Motion for extension of time to answer and proposed order filed. |
| Nov. 13 | Order entered granting deft an extension of time until 11/30/72 to file an Answer or other responsive pleading. (Gourley, J.) |
| Nov. 27 | ANSWER filed with certificate of service attached thereon. (Demand for Jury Trial) |
| Nov. 29 | Pretrial Memorandum and order entered. (Gourley, J.) |
| Nov. 29 | Order entered setting procedures. (Gourley, J.) |
| 1973 | |
| Jan. 5 | Motion to Transfer Action from U.S. Dist Court for the West. Dist of Pa to the Middle Dist of Pa filed by deft. |
| Jan. 8 | Motion for extension of time on all dates in the pretrial memorandum and order and proposed order filed. |
| Jan. 8 | Order entered granting Motion for Extension of Time of 30 days on all dates in the Pretrial Memorandum, (Gourley, J.) |
| Jan. 9 | Answer to Motion to Transfer Action filed by pltf. |
| Jan. 10 | Order entered setting hearing on Motion to Transfer for 1/16/73 at 10 A.M. (Gourley, J.) |

1973

Jan. 16 Hearing held on Motion to Transfer before Gourley, J. and concluded. (Memo filed) (Motion-Denied) (Trial set for 2/14/73) (Case consolidated with CA 72-857 for Trial)

Jan. 16 Order entered directing that certification from U.S. Marshal relative to mileage between Pgh & Somerset and Pgh & Harrisburg be filed as part of the record. (Gourley, J.)

Jan. 16 Order entered denying Motion of Transfer; consolidating case with CA 72-857 for Trial; counsel of U.S. make available for deposition on or before 1/30/73 persons deft shall request; parties are to confer and consult, and enter into a written stipulation on or before 2/12/73 and trial fixed for 2/14/73 at 10 A.M.; Court Reporter directed to transcribe the hearing held this date at the joint expense of the parties. (Gourley, J.)

Jan. 24 Praecipe for appearance for GMW Coal Co filed and for Delta Mining (filed 72-857)

Jan. 24 Letter to Atty Conflenti advising case assigned to Judge Gourley

Jan. 24 Order ent modifying order of 1/16, and directing 2/14 at 10 AM as time for pretrial. Stip of facts not in dispute to be filed by 2/12/73 (Gourley, J.)

Jan. 31 Transcript of hearing held 1/16 before Gourley, J. (rep M Schmitt) (filed 72-857)

Feb. 9 Motion to withdraw as atty for defts filed by E. W. Van Horn, Jr. (filed 72-857 with order ent granting same (Gourley, J.))

Feb. 9 Joint stipulation of facts filed at 72-857

Feb. 13 Deft's notice of and motion for judgment on the pleadings filed. (Filed at 72-857 C.A.)

Feb. 14 Hearing on motion for jdgmt on pleadings and pretrial conf held before Gourley, J. Memo filed



1973

(rep M Schmitt (filed 72-857) (case not consolidated)

Feb. 15 Order entered 2/14/73 assigning case to Hon. Herbert P. Sorg for trial the week of Feb. 26, 1973 or soon thereafter; court reporter is directed to transcribe the record of pretrial at the joint expense of the parties. (Gourley, J.)

Feb. 15 Order entered 2/14/73 denying Motion for Summary Judgment filed by deft; further directed that order entered consolidating case with CA 72-857 is hereby vacated. (Gourley, J.)

Feb. 23 Motion to withdraw appearance and proposed order filed by Thomas J. MacBride, Esq (Filed at 72-857 C.A.)

Feb. 26 Transcript filed re: Pretrial held at Pgh. on 2/14/73 before Gourley, J. (Rep. M. Schmitt) (filed 72-857 CA)

Feb. 26 Order entered granting Motion of Thomas J. MacBride, Esqr to withdraw as counsel for defts. (Sorg, J.) (Filed At CA 72-857)

Feb. 28 Hearing held on Further Pretrial before Sorg, J. and concluded. (Supplemental Pretrial Stipulation to be filed by 4/10/73) (Order to be entered) (Filed at CA 72-857)

Mar. 1 Order entered setting trial for 5/7/73; further order that the time for filing supplemental pretrial stipulation is extended to 4/10/73. (Sorg, J.)

Apr. 3 Motion for extension of time for filing stipulations and proposed order filed.

Apr. 3 Order entered granting Motion for Extension of Time for filing stipulations until 4/17/73. (Sorg, J.)

Apr. 18 Order entered continuing trial of case from May 14, 1973 to May 29, 1973 at 10 a.m. (Sorg, J.)

1973

Apr. 20 Motion for extension of time for filing stipulations and proposed order filed.

Apr. 23 Order entered extending time for filing stipulations to April 25, 1973. (Sorg, J.)

Apr. 30 Supplement to Stipulation of Facts Not in Dispute and Statement of Legal Issues upon Which Pltf and Deft are Not in Agreement filed.

May 7 Defendant's Notice of and Motion for Summary Judgment filed.

May 18 Hearing held on Motion for Summary Judgment before Sorg, J. and taken CAV. (Memo filed) (Rep: F. Jones) (Trial Scheduled for 5/29/73 is Continued until Further Order of Court)

May 25 Memorandum filed and Order entered granting Defendant's Motion for Summary Judgment. (Sorg, J.)

May 25 Pursuant to memorandum filed and Order entered Summary Judgment is hereby entered in favor of the defendant and against the plaintiff.

Bernhard Schaffler, Clerk

May 25 Notices mailed.

July 24 Notice of appeal filed by U.S.A.

July 24 Copy of notice mailed Ct of Appeals; copy to all counsel; letters to all counsel of record and to Judge Sorg.

Aug. 20 Original record mailed Ct of Appeals.

Aug. 22 Receipt for original record received from Ct of Appeals.

Sept. 5 Letter received from Ct of Appeals advising that case was docketed at 73-1753.



1974

Apr. 1 Opinion of U.S. Ct. of Appeals rec'd and filed affirming judgment of District court (filed 72-857)

June 13 Original record received from Ct of Appeals. (Receipt for same mailed)

June 13 CC of Judgment received from Court of Appeals Affirming Judgment of District Court; costs taxed in favor of appellees Edward Mears, et in C.A. 73-857 against the appellant U.S.A. in the sum of $243.60; costs taxed in favor of appellee Delta Mining in C.A. 72-928 against the appellant U.S.A. in the sum of $211.05; and judgment is hereby entered of record in as much costs were taxed by Ct of Appeals. (No costs taxed this case)

June 17 Order received from Ct of Appeals amending order of 3/20/74 as follows: first sentence in first full paragraph is amended and the last word in line 10 on page 9 is deleted. (Adams, J.) (Filed at C.A. 72-857)

1975

Jan. 24 Original Record forwarded to U.S. Supreme Court per telephone request.

IN THE UNITED STATES COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | |
|---|---|
| ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior, *Plaintiff* v. G. M. W. COAL COMPANY, INC., *Defendant* | Civil Action No. 72-890 |

## COMPLAINT FOR ENFORCEMENT OF CIVIL PENALTY ASSESSMENT ORDER

The Petition of Rogers C. B. Morton, by Richard L. Thornburgh, United States Attorney for the Western District of Pennsylvania, respectfully shows that:

1. This Complaint is for the enforcement of a civil penalty assessment order issued under an Act of the United States, namely, the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. Sec. 801, *et seq.*) (the Act).

2. Jurisdiction of this action is conferred upon the Court by Section 109(a) of the Act (30 U.S.C. Sec. 819(a) and 28 U.S.C. Sec. 1355.

3. Defendant is, and at all relevant times was a corporation, organized and existing under the laws of the Commonwealth of Pennsylvania, operating a coal mine subject to the Act in Somerset County, Pennsylvania, within the jurisdiction of this Court and maintaining its principal office at State Line, Pennsylvania.

4. Pursuant to Section 109(a) of the Act, a civil penalty in the amount of $50.00, was lawfully assessed against Defendant for violation of the Act. A true copy of the Amended Proposed Order of Assessment, which, in the absence of any protest or request by the Defendant for a hearing, became final on May 31, 1972, is attached hereto and made a part hereof Petitioner's Exhibit "A".

5. Further pursuant to Section 109(a) of the Act, a civil



penalty in the amount of $175.00 was lawfully assessed against the Defendant for violation of the Act. A true copy of the Proposed Order of Assessment, which, in the absence of any protest or request by the Defendant for a hearing, became final on December 27, 1971, is attached hereto and made a part hereof Petitioner's Exhibit "B".

6. Further pursuant to Section 109(a) of the Act, a civil penalty in the amount of $5,300.00 was lawfully assessed against the Defendant for violation of the Act. A true copy of the Proposed Order of Assessment, which, in the absence of any protest or request by the Defendant for a hearing, became final on January 24, 1972, is attached hereto and made a part hereof Petitioner's Exhibit "C".

7. Said assessment orders have not been vacated, modified, reversed or withdrawn and therefore are the final orders of the Secretary of the Department of the Interior, within the meaning and purview of Section 109(a)(4) of the Act (30 U.S.C. 819(a)(4)).

8. Despite demand, Defendant has failed and refused to pay said civil penalties as required by law.

9. WHEREFORE, Plaintiff respectfully prays that the Court enter judgment against Defendant for $5,525.00 together with interest and costs.

[Filed October 20, 1972]

UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C.

August 17, 1972

CERTIFICATION OF RECORD

*Pursuant to Title 30, Section 819(a)(4), Title 43, Section 1460, and Title 28, Section 1733, United States Code, and by virtue of the authority delegated to me by the Secretary of the Interior, I hereby certify that the annexed documents are true copies of the official record of the Bureau of Mines in the matter of the assessment of civil penalty against G. M. and W. Coal Company, Incorporated Grove No. 1 Mine Jennerstown, Somerset County, Pennsylvania Bureau of Mines Case No. 2110-1*

*IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of the Bureau of Mines, Department of the Interior, to be affixed on the day and year first above written.*

/s/ Everett Turner



UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: G. M. and W. Coal Company, Incorporated
Operator

Case No. 2110-1

August 17, 1972

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE Amended PROPOSED ORDER OF ASSESSMENT DATED May 31, 1972 DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

/s/ Everett Turner
ASSESSMENT OFFICER

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02398-0

IN THE MATTER OF
G. M. and W. Coal Company, Incorporated
Jennerstown, Somerset County, Pennsylvania
Mine: Grove No. 1
Case No.: 2110-1

*AMENDED PROPOSED ORDER OF ASSESSMENT*

A Proposed Order of Assessment was issued on October 26, 1971 assessing a civil penalty in the amount of $100.00 for certain violations under the Federal Coal Mine Health and Safety Act of 1969.

Protest having been made and duly considered,

It is now ordered that the assessment be amended as follows:

| Violation No. | Date Issued | Violation | Assessment |
|---|---|---|---|
| 1GWK | 06-15-71 | 70.230 | $50.00 |

Total Assessed Amount $50.00

/s/ Everett Turner
Assessment Officer

Dated at Washington, D.C.
and entered as the Amended
Proposed Order of Assessment
May 31, 1972

EXHIBIT "A"



**UNITED STATES OF AMERICA**

**DEPARTMENT OF THE INTERIOR**
**BUREAU OF MINES**
**WASHINGTON, D.C.**

**August 17, 1972**

**CERTIFICATION OF RECORD**

***Pursuant to Title 30, Section 819(a)(4), Title 43, Section 1460, and Title 28, Section 1733, United States Code, and by virtue of the authority delegated to me by the Secretary of the Interior, I hereby certify that the annexed documents are true copies of the official record of the Bureau of Mines in the matter of the assessment of civil penalty against G. M. and W. Coal Company, Incorporated Grove No. 1 Mine Jennerstown, Somerset County, Pennsylvania Bureau of Mines Case No. 2110-2***

***IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of the Bureau of Mines, Department of the Interior, to be affixed on the day and year first above written.***

**/s/ Everett Turner**

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: G. M. and W. Coal Company, Incorporated
Operator

Case No. 2110-2

August 17, 1972

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE PROPOSED ORDER OF ASSESSMENT DATED December 27, 1971 DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

/s/ Everett Turner
ASSESSMENT OFFICER



UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02398-0

IN THE MATTER OF — Case No. 2110-2
G. M. and W. Coal Company, Inc. — Mine: Grove No. 1

Jennerstown, Somerset County, Pennsylvania

*PROPOSED ORDER OF ASSESSMENT*

The above-captioned matter having come on for consideration and consideration having been given to all available information, including the gravity of the violation;

it is hereby order that G. M. & W Company, Inc. be and the same is hereby assessed a civil penalty in the amount of One hundred seventy-five dollars ($175.00) for the following violations:

| Violation No. | Date Issued | Violation | Assessment |
|---|---|---|---|
| 1 H.K.G. | 08-27-71 | 70.100 | $ 25.00 |
| 1 J.J.T. | 09-14-71 | 75.603 | 100.00 |
| 2 J.J.T. | 09-14-71 | 75.516 | 50.00 |

Total Assessed Amount $175.00

/s/ David L. Caldwell
Assessment Officer

Dated at Washington, D.C.
and entered as the Proposed
Order of Assessment
December 27, 1971

EXHIBIT "B"

UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C.

August 17, 1972

## CERTIFICATION OF RECORD

***Pursuant to Title 30, Section 819(a)(4), Title 43, Section 1460, and Title 28, Section 1733, United States Code, and by virtue of the authority delegated to me by the Secretary of the Interior, I hereby certify that the annexed documents are true copies of the official record of the Bureau of Mines in the matter of the assessment of civil penalty against G. M. and W. Coal Company, Incorporated Grove No. 1 Mine Jennerstown, Somerset County, Pennsylvania Bureau of Mines Case No. 2110-3***

***IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of the Bureau of Mines, Department of the Interior, to be affixed on the day and year first above written.***

**/s/ Everett Turner**



UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: G. M. W. Coal Company
Operator

Case No. 2110-3

August 17, 1972

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE PROPOSED ORDER OF ASSESSMENT DATED January 24, 1972 DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

/s/ Everett Turner
ASSESSMENT OFFICER

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02398-0

IN THE MATTER OF
G. M. W. Coal Company
Jennerstown, Somerset County, Pennsylvania — Re: Mine: Grove No 1. Case No. 2110-3

*PROPOSED ORDER OF ASSESSMENT*

The above-captioned matter having come on for consideration and consideration having been given to all available information, including the operator's history of previous violations, the appropriateness of the proposed assessment to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged:

it is hereby ordered that G. M. W. Coal Company be and the same is hereby assessed a civil penalty in the amount of Five thousand three hundred dollars ($5,300.00) for the following violation:

| Violation No: | Date Issued | Violation | | Assessment |
|---|---|---|---|---|
| 1 D.W. M. | 05-11-71 | 75.1712 | | $ 25.00 |
| 1 H.K.G. | 09-07-71 | 70.230 | | 25.00 |
| 1 H.K.G. | 10-26-71 | 70.230 | | 25.00 |
| 1 D.B.A. | 11-17-71 | 75.603 | | 100.00 |
| 2 D.B.A. | 11-17-71 | 75.516 | | 100.00 |
| 1 R.J.F. | 11-24-71 | 104(a) | 75.400 75.403 | 5,000.00 |
| 2 D.B.A. | 12-01-71 | 75.307 | | 25.00 |

Total Assessed Amount $5,300.00

/s/ Everett Turner
Assessment Officer

Dated at Washington D. C.
and entered as the Proposed
Order of Assessment
January 24, 1972

EXHIBIT "C"



*Morton* v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

ANSWER

G. M. W. Coal Company, Inc. Defendant in the above-captioned case, answers the Complaint herein as hereinafter set forth in separate Defenses. In addition, and pursuant to Section 109(a)(4) of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter the Act or Coal Act), Defendant demands a de novo trial on all relavant issues and requests that all disputed issues of fact be submitted to a jury.

First Defense

1. Defendant denies each and every allegation in the Complaint except as hereinafter specifically admitted.

2. In answer to paragraphs 1 and 2 of the Complaint, Defendant admits that Plaintiff seeks to enforce purported civil penalty assessment orders purportedly issued under the Coal Act, but Defendant denies that jurisdiction of the action is properly conferred upon the Court as alleged in paragraph 2 because such purported orders were illegally and improperly issued.

3. Defendant admits paragraph 3 of the Complaint.

4. In answer to paragraphs 4, 5, and 6 of the Complaint, Defendant admits that Exhibits A, B, and C, referred to in such paragraphs, are attached to the complaint, but Defendant denies all other allegations in said paragraphs 4, 5, and 6 of the Complaint.

5. Defendant denies all of paragraph 7 of the Complaint, except that Defendant admits the purported assessment orders have not been vacated, modified, reversed, or withdrawn.

6. Defendant denies all of paragraph 8, except that Defendant admits it has refused to pay the purported civil penalties.

Second Defense

7. Defendant repeats each allegation set forth hereinabove.

8. Defendant avers that the Court does not have juris-

diction to enforce the purported orders of assessment, or to require Defendant to submit to an expensive, lengthy, trial on said orders, because all of the purported orders mentioned in the Complaint were illegally and improperly assessed in violation of Defendant's rights under the Coal Act.

9. The illegality and impropriety of the said orders arise from the fact that the assessment procedures leading to the said orders were not in conformity with the Coal Act which provides that—

> (a) "In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business, of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation." (Section 109(a)(1) of Act); and
> (b) "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing. . . ." (Section 109(a)(3) of Act.)

10. Defendant avers that Plaintiff could not possibly have complied with Section 109(a)(1) of the Act because the purported assessments were made in accordance with the following minimum penalty schedule.

"Appendix A

Guidelines for Assessment of Penalties

| Type of Violation | Penalty Range |
|---|---|
| 1. Mine Operators: | |
| A. Imminent Danger Withdrawal Orders | $5,000-$10,000 |
| B. Other Withdrawal Orders | $1,000-$5,000 |
| C. Serious violations | $ 100-$1,000 |
| D. Nonserious violations | $ 25-$500 |
| 2. Miners: | |
| Smoking or the carrying of smoking materials matches, or lighters | $ 25-$500 |



*Note:* Consideration of all relevant circumstances in the case of a particular violation may warrant the Assessment Officer's proposing a civil penalty in an amount more than or less than the range set forth above."

(Federal Register, Vol. 36, No. 11-Saturday, January 16, 1971)

Defendant further avers that it submitted a substantial amount of data to show a lower assessment was required by the six statutory standards provided by Section 109(a)(1) of the Act, but Plaintiff's agents ignored such data stating that the assessment policies prohibited deviation from the penalty schedule. The said penalty schedule is illegal, and penalties assessed thereunder are illegal, because its structure is such that it contains an inherent prohibition against the logical application of the six statutory standards, all of which is evidenced by the Plaintiff's recent abolition and termination of use of such penalty schedule.

11. Defendant further avers that the regulations under which the purported orders were issued prohibited the Defendant from having a hearing prior to the assessment of the purported penalties, although the right to such hearing is guaranteed by Section 109(a)(3) of the Coal Act. In fact such regulations forced Defendant to participate in a lengthy, expensive assessment procedure which is not in conformity with the Coal Act, and which is violative of Defendant's constitutional rights to due process.

12. As a further reason why the Court lacks jurisdiction to enforce the purported orders, Defendant avers that the so-called "Certification of Record", Plaintiff Exhibits A, B, and C, does not constitute an adequate record within the meaning of the provisions of Section 104(a)(4) of the Act which requires Plaintiff to certify and file with the Court "the record upon which such order sought to be enforced was issued." The Coal Act expressly provides that the Court shall not have jurisdiction until such record is filed with the Court.

Third Defense

13. Defendant repeats each allegation set forth hereinabove.

14. Defendant avers that the so-called "Certification of Record is not in compliance with the Coal Act and is violative of Defendant's substantive and procedural due process rights under the Fifth Amendment to the Constitution of the United States in that—

(a) The findings of violations and amounts of penalties therein were made and determined ex parte, on the basis of the unsworn testimony of coal mine inspectors, and without Defendant having opportunity to submit interrogatories to or cross-examine such inspectors:

(b) The findings of violations and amounts of penalties therein were made and determined without any consideration being given to a vast amount of evidence submitted by Defendant to show that in most instances the alleged violations did not occur at all, did not occur because of fault by the Defendant, or did not constitute a significant health or safety hazard; and

(c) The findings of violations and amounts of penalties therein were made and determined arbitrarily and the Secretary's decisions do not adequately show the evidenciary basis for the findings of violations and penalty amounts or the manner by which such findings and penalty amounts were made and determined as required by the Act.

15. Defendant further alleges that the purported findings of violations and penalty assessment orders, signed Everett Turner, Assessment Officer, and included in Plaintiff's Exhibits A, B, and C, are illegal, null, and void, because Section 109(a)(3) of the Act requires that such findings and orders shall be made by the Secretary of Interior.

Fourth Defense

16. Defendant repeats each allegation set forth hereinabove.

17. Defendant denies each and every alleged violation of or under the Coal Act which constitute the basis of the said purported civil penalty assessment orders and, further, Defendant demands strict proof of each and every such alleged violation underlying the purported orders.

WHEREFORE, Defendant prays this Court to enter a judgment against Plaintiff dismissing the Complaint and awarding costs to Defendant.

[Filed November 27, 1972]



*Morton* v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

TRANSCRIPT OF PRETRIAL CONFERENCE

Pretrial Conference commencing at 11:52 a.m. on Wednesday, February 14, 1973, in the United States District Court, Pittsburgh, Pennsylvania, before the Honorable Wallace S. Gourley.

Appearances:

On behalf of the Plaintiff:

Alex L. McNaugher,
Assistant U. S. Attorney

I. Avrum Fingeret, Esquire
Department of Interior

Robert L. Teagan, Esquire
Department of Justice

On behalf of the Defendant:

Frederick R. Blackwell, Esquire

Marbin I. Schmitt
Court Reporter

[2] THE COURT: Now, what is the government's case in connection with Civil Action 72-890?

MR. FINGERET: Your Honor, in G.M.W. Coal Company, Grove No. 1 Mine, the government will base its case on certain violations of the ——

THE COURT: I want you to say what the coal company did wrong. Neither of you have to make the same extensive speeches that you made in Civil Action 72-857.

MR. FINGERET: A portable fire extinguisher is not provided in No. 3 entry left section where 100 gallons of oil are stored.

The required number of valid respirable dust samples in Section 002 was not submitted for the current sampling period.

Based upon the results of five samples, the concentration of the respirable dust in the working environment at the

continuous miner operator in Section 002 was 3.3 milligrams per cubic meter of air.

Another violation showing the required number of valid respirable dust samples in Section 003 was not submitted for the currect[*sic*] sampling period.

Additionally, there were three temporary [3] splices in the trailing cable for the belt feeder at the tail of No. 2 main belt.

The belt control cable in Section 002 was not all installed and insulated on the belt feeder for 300 feet.

The pump cables for No. 5 Feeder of Section 002 was not installed on insulators.

The required number of valid respirable dust samples in Section 004 was not submitted for the current sampling period.

The trailing cable in the continuous miner had a temporary splice nine feet from the machine.

Loose coal was in excess of three inches deep for a distance of 80 feet in by site pad in No. 3 Main Entry for a distance of eight feet and No. 5 end butt and No. 1 and 2 Main Entry and also for a distance of 40 feet and No. 3 Main Entry end butt, the rock dust was inadequate in the above described area.

Additionally, the power cable for the sequence switch on the conveyor belt on Section 3088 was not supported on insulators and was in contact with combustible material.

That will be the entire violations that [4] we will enter.

THE COURT: The rest of your argument that you made in Civil Action 72-857 will apply to 72-890.

What is your defense to the alleged violations?

MR. BLACKWELL: It will be the same as I described in the other case, Your Honor.

THE COURT: And you allowed none of the conditions that the government said to take place.

MR. BLACKWELL: There were some that did occur but without fault of the operator, Your Honor.

THE COURT: Is there anything more that either of you want to say about Civil Action 72-890?

MR. FINGERET: Nothing, Your Honor.

THE COURT: I am going to give you until February 21 to interchange your exhibits. Mark your exhibits and send them on or before February 21.

You shall also give each other the list of your witnesses on or before February 21.



What is your estimate of trial time?

[5] MR. FINGERET: In this particular case, Your Honor, a week to a week and a half.

THE COURT: Five to seven days?

MR. FINGERET: Yes, as the defendant will not stipulate as to the chain of possession or the authenticity of certain tests that have been involved in these violations. It is going to take considerable testimony to show such chain possession.

THE COURT: How much time do you want, sir?

MR. BLACKWELL: We will add two and a half to three days to that, Your Honor.

THE COURT: The estimate of trial time is ten days.

Is there anything else?

MR. FINGERET: The government has nothing further, Your Honor.

THE COURT: This case is assigned to the Honorable Herbert P. Sorg starting the week of February 26 or as soon thereafter as the judge is available.

Now, do either of you want a copy of this for yourselves? You can't take it out of the Clerk's office during the trial. It doesn't matter to me,

[6] MR. FINGERET: The government would like a copy.

MR. BLACKWELL: Yes, Your Honor.

THE COURT: Make an original and two copies.

The Court will recess.

(Thereupon, the Court was recessed.)

*Morton* v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

ORDER

AND NOW, this 14th day of February, 1973, the immediate matter before the Court is a motion for summary judgment filed on behalf of the defendant. The Court has considered the motion, the briefs submitted by counsel, and the oral argument held this date, and said motion is denied.

It is further directed that the Order previously entered by the Court in which the within proceeding and Civil Action No. 72-857 were consolidated is hereby vacated because of the involved legal intricacies of the respective cases.

/s/ Wallace S. Gourley
Senior District Judge



*Morton* v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

ORDER

AND NOW, this 14th day of February, 1973, the within proceeding is hereby assigned to the Civil Jury List of the Honorable Herbert P. Sorg to be fixed for final trial the week of February 26, 1973, or as soon thereafter as the Court is available. Counsel shall exchange the list of witnesses to be called for trial and also mark and interchange all exhibits on or before February 21, 1973.

The Court reporter is directed to transcribe the record of the pretrial held at the joint expense of the parties and the original is to be filed in the office of the Clerk of Courts to be used by any member of this Court.

/s/ Wallace S. Gourley
Senior District Judge

*Morton* v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

ORDER

AND NOW, this 1st day of March, 1973,

IT IS ORDERED that Monday, May 7, 1973, be and the same is hereby fixed for trial of the above captioned case.

IT IS FURTHER ORDERED, upon agreement of the parties, that the time for filing supplemental pretrial stipulations be and the same is hereby extended to April 10, 1973.

/s/ Herbert P. Sorg D.J.



*Morton* v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

SUPPLEMENT TO STIPULATION OF FACTS NOT IN DISPUTE AND STATEMENT OF LEGAL ISSUES UPON WHICH PLAINTIFF AND DEFENDANT ARE NOT IN AGREEMENT

I. Plaintiff and Defendant, by and through their undersigned attorneys stipulate as follows:

1. The following procedure was followed by the Bureau of Mines in submitting the dust samples (hereinafter "samples") to the Coal Analysis Section, Bureau of Mines, Pittsburgh, Pa.

(a) The plastic bags containing the samples and the identification tag attached thereto, and the record cards were packed in a corrugated cardboard shipping carton. This carton was addressed to Coal Analysis Section, U.S. Bureau of Mines, 4800 Forbes Avenue, Pittsburgh, Pennsylvania.

(b) Said carton was shipped by United States Mail, Parcel Post, to the above-mentioned address.

(c) Upon arrival at the United States Post Office, Oakland Substation, Pittsburgh, Pennsylvania, said carton was picked up, together with all other mail addressed to the U.S. Bureau of Mines, 4800 Forbes Avenue, Pittsburgh, Pennsylvania, by a Bureau of Mines Truck. The aforesaid carton containing the subject samples, together with all other mail addressed to the Coal Analysis Section, was delivered directly to said Section.

(d) Upon delivery of the mail, including the subject carton containing the samples, to the Coal Analysis Section, the mail was distributed and said carton was given to Mr. Raymond Drogwski. Mr. Drogwski opened the carton, took out the samples and the record cards, matched the description on the record cards with the description on the tags affixed to the bags containing samples, stamped the date of receipt on the card, and assigned Laboratory Numbers to the samples. He then wrote the Laboratory Numbers on both the tags and the record cards. The date of receipt was November 29, 1971.

(e) At this point, the bags were not opened and the tags were still attached thereto.

(f) The samples, tags, and record cards were then delivered to Mr. Thomas Majercik, Physical Science Technician.

II. Plaintiff and Defendant are not in agreement on the following legal issues:

1. Whether Plaintiff's procedure and actions regarding assessment of civil penalties herein were in conformity with Section 109(a)(3) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 819(a)(3).

2. Whether Plaintiff's actions regarding assessment of civil penalties herein were in conformity with his published regulations.

3. Whether the *de novo* provision in Section 109(a)(4) of the aforesaid Act, 30 U.S.C. 819(a)(4), is limited to the issue of amount of penalty, or whether such provision encompasses the fact of violation of a standard as well as the issue of penalty amount.

4. Whether a penalty may be assessed for conditions or practices which have not been the subject of a "Notice of Violation" issued by the coal mine inspector who observed said conditions, but which conditions or practices have been stated in an "Order of Withdrawal" issued by said inspector.

III. Plaintiff intends to call as witnesses some or all of the following:

1. Robert J. Chappell, Federal Coal Mine Inspector, Bureau of Mines Subdistrict Office, Johnstown, Pennsylvania.

2. John Nagy, Technical Advisor, United States Bureau of Mines, Technical Support Group, Pittsburgh, Pennsylvania 15213.

3. William R. Devott, Subdistrict Manager, U.S. Bureau of Mines, Johnstown, Pennsylvania.

4. Thomas Majercik, Physical Science Technician, Bureau of Mines, 4800 Forbes Avenue, Pittsburgh, Pennsylvania 15213.

5. Forrest Walker, Chemist in Charge, Coal Analysis Section, Bureau of Mines, 4800 Forbes Avenue, Pittsburgh, Pennsylvania 15213.

IV. Defendant intends to call as witnesses some or all of the following:

1. Freeman Fleegle, roof bolter, 224 Main Street, Boswell, Pennsylvania.



2. Donald Shaffer, continuous mining machine operator, Box 1403, Gray, Pennsylvania.

3. Charles R. Davis, mine foreman, 125 West Garrett Street, Somerset, Pennsylvania.

4. Thomas J. MacBride, attorney, P.O. Box 108, 100 Wynneerest Drive, Wayhesboro, Pennsylvania 17268.

5. Charles D. Davis, map draftsman, 125 West Garrett Street, Somerset, Pennsylvania.

6. James E. Park, vice president, G. M. and W. Coal Company, Inc., Broad Top City, Pennsylvania.

7. C. Kenneth Crotsley, Secretary-Treasurer, G. M. and W. Coal Company, Inc., Broad Top City, Pennsylvania.

8. Fred Drening, Jennerstown, Pennsylvania.

9. Everett Turner, Assessment Officer, U.S. Bureau of Mines, 1725 K Street, N.W., Washington, D.C. 20240.

10. John Noon, Assessor, U.S. Bureau of Mines, Uniontown, Pennsylvania.

Respectfully submitted,

/s/ Alexander L. McNaugher
Assistant U.S. Attorney

/s/ I. Avrum Fingeret
Trial Attorney

/s/ Frederick R. Blackwell

/s/ Franklyn E. Conflenti

[Filed April 30, 1973]

*Morton* v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Please Take Notice that the undersigned will bring the within Motion on for hearing before the U. S. District Court for the Western District of Pennsylvania, U. S. Courthouse and Postoffice Building, Pittsburgh, Pennsylvania, on the 7th day of May, 1973, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Motion For Summary Judgment

Defendant in the above-captioned case moves for Summary Judgment on the following grounds.

(1) The penalties herein are based upon *pro forma* conclusionary Orders of Assessment and "Findings of Fact" which do not comply with the language and intent of Section 109(a)(3) of the Federal Coal Mine Health and Safety Act of 1969, 30 U. S. C. § 819(a)(3). In a case involving this identical ground and identical facts, the U. S. District Court for the District of Columbia has ruled that the procedural requirements of the Act "have not been complied with" and has issued its order restraining the Plaintiff from making further penalty assessments under the Coal Act under the present procedures of the Department of Interior. *National Independent Coal Operators Association, et. al., vs. Rogers C. B. Morton, Secretary of the Interior,* Civil Action No. 372-72. (U.S.D.C. March 7, 1973) (See attached March 7, 1973 Memorandum and Order of the D.C. District Court; also the Court's March 15, 1973 Restraining Order which was stayed for 40 days by Orders of the Court, but which became effective on April 25, 1973.)

(2) The penalties herein were assessed without any prior or concurrent "Findings of Fact" that the alleged violations for which penalties were assessed had in fact occurred. No such "Findings of Fact" were made by Plaintiff and/or his agents until long after the dates of the herein orders of penalty assessments and, moreover,



such "Findings of Fact" were not made known to Defendant until the filing of the Complaint herein, all of which constituted failure by the Plaintiff and/or his agents to comply with Section 109(a)(3) of the Act, 30 U.S.C. 819(a)(3), which provides that:

> "A civil penalty shall be assessed by the Secretary only after . . . the Secretary has determined, *by decision incorporating his findings of facts therein, that a violation did occur,* and the amount of the penalty which is warranted . . ." (Emphasis supplied).

(3) The Plaintiff and/or his agents declared each of the assessment orders herein to be the "Final Order of the Secretary" by a method and procedure which does not have any statutory or regulatory basis and which in fact was in conflict with the Plaintiff's own published assessment procedures. Section 100.4(h), Title 30, Chapter 1, Subchapter 0, CFR, effective January 16, 1971, provides as follows:

> "The Operator or minor charged shall have 15 working days from the date of receipt of such amended or reissued order to *accept* the amended or reissued order, *whereupon* it shall become the final assessment order of the Secretary, or to request formal adjudication with opportunity for hearing." (Emphasis supplied)

If the Assessment Officer's order is not accepted by the operator, the above text provides no authority whereby it can become the final order of the Secretary. This Defendant did not accept the orders. But in transmittal letters signed by Mr. Everett Turner, Plaintiff's Assessment Officer, it was declared that, unless Defendant requested a hearing within fifteen days, the order will become the final order of the Secretary.

This Motion is based upon the pleadings and the certified testimony of Mr. Everett Turner from the trial of the above-cited case of *National Independent Coal Operators Association vs. Rogers C. B. Morton, Secretary of Interior, et. al.,* and upon a Report of the U.S. General Accounting Office and the pertinent Regulations of the Department of the Interior, both of which are properly before this Court

as a matter of Judicial Notice of the Official Acts of a United States Administrative Agency. The testimony of Mr. Turner, the Report, and the Regulations are contained in the Appendix annexed hereto.

[Filed May 7, 1973]



UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02398-0

CERTIFIED MAIL

Return Receipt Requested

January 13, 1971
[January 13, 1972]

G. M. and W. Coal Company, Inc.
Greencastle, Pennsylvania 17225
Attention: Dwight L. Grove, President

Re: Mine: Grove No. 1
Case No.: 2110-1
Proposed Order Affirmed (xx)
Amended Order Affirmed ( )

Gentlemen:

Receipt is acknowledged of your letter of protest dated *November 26, 1971* relevant to the Order of Assessment dated *October 26, 1971.* After review of all available information, including your letter of protest, the matter was given careful consideration, and the Order of Assessment is hereby affirmed. Please be advised that the abatement of a violation of the Federal Coal Mine Health and Safety Act of 1969 is not a defense relative to a proposed assessment. You may, within fifteen working days of receipt of this letter, request in writing a formal adjudication with an opportunity for a hearing to:

Assessment Officer
U.S. Bureau of Mines
Room 635
4015 Wilson Boulevard
Arlington, Virginia 22203

If we do not receive a request for adjudication within the aforementioned time, the matter will then become final. In replying, please refer to the case number.

Payment of the assessment should be made in the form

of check or money order made payable to the United States Bureau of Mines and mailed to:

Chief, Division of Finance
U.S. Bureau of Mines
Building 20
Denver Federal Center
Denver, Colorado 80225

Sincerely yours,

/s/ Everett Turner
Assessment Officer



UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02398-0

CERTIFIED MAIL

Return Receipt Requested
G. M. and W. Coal Company, Inc.
Greencastle, Pennsylvania 17225

December 27, 1971

Re: Mine: Grove No. 1
Case No.: 2110-2

Attention: Dwight L. Grove, President

Gentlemen:

Enclosed is a Proposed Order of Assessment concerning the above-captioned matter setting out the number, date, section violated and the proposed amount for each citation. You may protest in writing the proposed assessment for each violation or request formal adjudication within fifteen working days of your receipt of this correspondence to:

Assessment Officer
U.S. Bureau of Mines
Room 635
4015 Wilson Boulevard
Arlington, Virginia 22203

Failure to file a protest to the proposed assessment or request formal adjudication within the afore-mentioned time will be considered a waiver of your right to protest including your right to formal adjudication and an opportunity for a hearing. The matter will then become the final Order of the Secretary. In replying please refer to the case number.

Payment of the assessment should be made in the form of check or money order made payable to the U.S. Bureau of Mines and mailed to:

Chief, Division of Finance
U.S. Bureau of Mines

Building 20
Denver Federal Center
Denver, Colorado 80225

Sincerely yours,

/s/ Everett Turner
Assessment Officer
/s/ David L. Caldwell



UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02398-0

CERTIFIED MAIL

Registered Return Receipt Requested
G. M. W. Coal Company
Greencastle, Pennsylvania 17225

January 24, 1972

Re: Mine: Grove No. 1
Case No.: 2110-3

Attention: Dwight Grove, President

Gentlemen:

Enclosed is a Proposed Order of Assessment concerning the above-captioned matter setting out the number, date, section violated and the proposed amount for each citation. You may protest in writing the proposed assessment for each violation within fifteen working days of your receipt of this correspondence to:

Assessment Officer
U.S. Bureau of Mines
Room 635
4015 Wilson Boulevard
Arlington, Virginia 22203

Failure to file a protest to the proposed assessment within the aforementioned time will be considered a waiver of your right to protest including your right to formal adjudication and an opportunity for a hearing. The matter will then become final. In replying please refer to the case number.

Payment of the assessment should be made in the form of check or money order made payable to the U.S. Bureau of Mines and mailed to:

Chief, Division of Finance
U.S. Bureau of Mines

Building 20
Denver Federal Center
Denver, Colorado 80225

Sincerely yours,
/s/ Everett Turner
Assessment Officer

Enclosure



UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES

*ORDER OF WITHDRAWAL*

No. 01RJC
8:15 A.M.
November 24, 1971

Johnstown, Pa.

To the operator of the Grove No. 1 mine, G. M. & W. Coal Company, Inc., Jennerstown, Somerset County, Pa., Box 112, Jennerstown, Pa.

Notice is hereby given that the undersigned authorized representative of the Secretary of the Interior, upon making an inspection of this mine on , 19 , finds the existence of the following described condition or practice which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

*Condition or practice:*

Loose coal was in excess of 3″ deep for a distance of 80 ft. inby sight [spad] No. 160 in No. 3 Main Entry, for a distance of 80 ft. inby No. 3 Entry of 5 Left butt, in Nos. 1 and 2 Main Entries, and also for a distance of 40 feet in No. 3 entry of 5 Left butt. The Rock dust was inadequate in the above described areas.

In accordance with Sec. 104.(a) of the Federal Coal Mine Health and Safety Act of 1969, (P.L. 91-173) you are hereby ordered to cause all persons, except persons referred to in Sec. 104.(d) of the Act, to be withdrawn from and prohibited from entering the following area until an authorized representative of the Secretary of the Interior has determined that the above-described imminent danger no longer exists:

*Area from which persons must be withdrawn and prohibited from entering:*

The Sections inby the No. 3 belt tail of the Main heading.

Signed Robert J. Chappell

Note: Review of this Order pursuant to Sec. 105.(a) of the Act may be made upon application to the Board of Mine Operations Appeals.

*REPORT TO THE*
*CONSERVATION AND NATURAL*
*RESOURCES SUBCOMMITTEE*
*COMMITTEE ON GOVERNMENT*
*OPERATIONS*
*HOUSE OF REPRESENTATIVES*

Improvements Needed
In The Assessment And Collection
Of Penalties—Federal Coal Mine
Health And Safety Act Of 1969

Bureau of Mines
Department of the Interior

*BY THE COMPTROLLER GENERAL*
*OF THE UNITED STATES*

B-170686 July 5, 1972

• • • • •

[25] *GUIDELINES*

The Bureau has not prepared guidelines for assessors to use in considering the factors for penalty assessment and in deciding how the factors should be weighted in determining the amount of the penalty within the ranges provided in the penalty schedule. Assessors relied on their personal judgment, their mining and inspection experience, and informal policy-setting conferences to define and weight these factors. The chief assessment officer informed us that, when inspectors were temporarily assigned as assessors, they were given an oral presentation concerning the assessment procedures and the consideration to be given to the six factors.

The official penalty schedule, established in January 1971 and used in assessing penalties for violations cited after April 1, 1971, provided for ranges in the dollar amounts of penalties to be assessed, depending on the gravity of the violations. For example, the penalty range for a nonserious violation was from $25 to $500.

A GAO sample of about 400 violations [1] assessed from

[1] The violations were contained in 52 proposed assessment cases from 190 randomly selected cases in which the violations were dated April 1, 1971, and after.



April through December 1971 showed that about 50 percent of the penalties were assessed at the minimum amounts. Mines producing 2,000 tons, or more, of coal a day were cited for 50 of the violations at minimum amounts.

Because of the lack of any written guidelines defining the factors and describing the consideration and weight to be given each and the lack of documentation on the consideration given to each of the factors, we were unable to determine the adequacy of the consideration given to the six factors and the basis for the penalties assessed in these sample cases.

To assist the assessors in the consideration given to the six factors in determining the amounts of penalties to be assessed, guidelines are needed to define each of the [26] factors and to describe how they are to be considered, as well as the weight to be given each factor. Such guidelines would assist (1) assessors in determining penalty amounts and (2) assessors, assigned to reassess disputed penalties, and supervisory personnel, assigned to review assessments, to understand how penalty amounts were determined.

Because the Bureau had not established guidelines for considering the six factors, the mine operators did not know how the factors should be considered and weighted in determining the amount of a penalty. Considering the significance of the dollar amounts of many penalties assessed and the inherent subjectivity in determining the amounts assessed, it appears reasonable that the mine operator should be advised of the guidelines used in assessing penalties.

In addition to submitting a written protest, a mine operator may request a meeting with an assessment officer to discuss his protest. We noted that a significant portion of an assessor's time was spent in such meetings. The chief assessment officer estimated that about 35 percent of the time of three assessment officers was spent meeting with mine operators. Records of these meetings were not maintained, and we could not identify the cases for which such meetings were held. If mine operators knew how the six factors were considered by the assessor, however, the need for these meetings and the number of protests could be reduced.

An official of the Solicitor's Office informed us early in April 1972 that he believed broad guidelines could be es-

tablished on the basis of experience under the act and that his office was working on a response to a request from the Bureau for assistance in preparing guidelines. On April 21, 1972, the Solicitor's Office forwarded suggested guidelines to the Director, Bureau of Mines, for his consideration. A Bureau official informed us on May 24, 1972, that the suggested guidelines were being studied but that a decision had not been reached on their use.

[27]

*INFORMATION IN PROPOSED ASSESSMENT ORDERS*

The act requires a finding that a violation did occur and requires consideration of six factors in determining the amount of a penalty.

The Subcommittee requested our opinion on whether the findings of fact must include explanations of the consideration given to the six factors and whether the explanations must therefore be included in the proposed order of assessment sent to the mine operator.

Examination of the act and its legislative history did not disclose anything which might be helpful in answering the Subcommittee's questions. We are of the opinion that, in the absence of some indication of intention to the contrary, there is nothing in the wording of subsection 109(a)(3) which would require a conclusion that explanations of the consideration given the six factors should be included in the findings of fact. The six factors are concerned with the amount of penalties, while the findings of fact are required to support findings of violations.

Accordingly, it is our view that, although the six factors must be considered, a description of how the factors were actually considered in determining a specific penalty does not have to be given in the proposed order of assessment sent to the mine operator. In view of the significance of the dollar amounts assessed and the inherent subjectivity in determining the amounts assessed, it appears reasonable that any guidelines developed for use in assessing penalties should be made available to mine operators.

*DOCUMENTATION AND REVIEW OF ASSESSMENT ACTION*

Proposed orders of assessment should be reviewed on a test basis by Assessment Office officials to evaluate assessor



performance. However, documentation on how the penalty amount was determined was inadequate. The assessment worksheets, the only documentation of the assessment action, listed only the health and safety standards violated and the dollar amounts of the initial assessment and the reassessment for each penalty. There was no documentation showing how or [28] whether the assessor considered (1) the six factors in arriving at the penalty amount or (2) the mine operator's protest when reassessing the case. In our opinion, such documentation is necessary for assessment officials to understand the reasoning behind an original assessment and to facilitate a management evaluation of an assessor's performance and of the overall assessment function.

In a case consisting of 54 violations, the mine operator, in protesting all violations, said that he considered the penalties too high, but he provided specific information on only four. The assessor reduced penalties for the four violations and also for 33 others, 31 of which were reduced 50 percent or more below the initial assessment amounts. There was no documentation showing the bases for the initial penalties or for the amounts of the reassessments.

*CONCLUSIONS*

The consideration of each factor could be improved through the issuance of guidelines defining each of the six factors and describing the consideration and weight that should be given each factor in determining the amount of a penalty. Adequate documentation should be required to show the consideration given each factor in assessing a penalty.

These guidelines should be made available to the mine operators so that they would better understand how the penalties were assessed.

*RECOMMENDATIONS TO THE SECRETARY OF THE INTERIOR*

We recommend that the Director, Bureau of Mines, be required to:

—Issue guidelines defining each of the six factors, and describing the consideration and weight that should be given each determining the amount of a penalty.
—Make the guidelines available to mine operators.

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UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, ET AL
*plaintiffs*

*vs.*

ROGERS C. B. MORTON, ET AL
*defendants*

No. 397-72 *Civil Action*

I, JAMES F. DAVEY, Clerk *of THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, do hereby certify the annexed to be a true and correct copies of the original* certain pages of Deposition of Everett Turner, dated October 3, 1972, filed 11-2-72 (pp. 341, 342 & 343) - (pp. 338, 339 & 340) - (pp. 366 & 367); (page 578) - Deposition of Everett Turner, dated October 5, 1972, filed 11-2-72; (pp. 47 & 48) - Deposition of Everett Turner, dated June 22, 1972, filed Jul 17, 1972
*as (they) appear ..... of record in the Clerk's Office of said Court in the above-entitled cause.*

*IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, this 2nd day of May, 1973*

JAMES F. DAVEY, Clerk
By Mary E. Johnson
*5/2/73 Deputy Clerk.*

• • • • •

[341] call a buck slip; and we keep a copy of that buck slip for our records; so we know when they come back in here what we asked for primarily.

Q. What does the buck slip state?

A. Different things, depending on what is requested. If it states that it does not appear to be a violation as stated, if further explanation or something is on it to that effect, or if a notice of violation comes in that doesn't have an abatement, we do not make the assessment on that; we



send it back to the district and tell them we must have the final action taken on that before we can make a determination on it.

Those buck slips referred to whatever is necessary pertaining to that violation or group of violations.

Q. Now, if the notice of violation states on its face what appears to be a description of a violation of a safety or health standard, do you pursue that any further, or do you accept that statement as representative of the existence of a violation?

A. We accept that if it states a violation as threatened in the description.

Q. So the only time you would call the inspector or the field office would be where there was some irregularity, as [342] it were, on the face of the notice of violation?

A. Normally speaking, yes. However, there might be some lack of adequate description of a violation or exception as indicated may be in error, and we have not established that a violation occurred of that section.

Q. Now, do you make any findings that a violation did occur prior to the time that you or your staff prepare the penalty assessment or proposed order of assessment?

A. Yes; we do.

Q. In what manner do you make it?

A. We—in what manner is it made or record, or what?

Q. Well, you say you make a finding. Tell us how you make a finding.

A. We make a finding on the basis of the charge made by the authorized, duly authorized representative of the section.

Q. In other words, you must find that that states a violation.

A. Right.

Q. You do not find, though, that a violation did in fact occur; is that correct, other than your determination that what appears on the notice purports to charge the occurrence of a violation.

[343] A. That is right.

Q. Now, that charge or citation or notice of violation or whatever we would call it, that, as Mr. Smith has previously said, is not an established violation until a specific finding is made that there was in fact a violation; is that correct?

A. I am not sure that I follow that question.

Q. Well, let me refer you to your—to the affidavit which you submitted, which you signed and which was submitted to the Court in this case in support of the motion of defendants for summary judgment; and in Paragraph 5 of that affidavit, you state: The Secretary, through the assessment procedure, delegated to the Bureau of Mines assessment officer the authority to initially consider whether in fact there was a violation of the Act.

And it goes on to say, If it is found by the assessment officer that a violation of the Act has occurred an initial proposed order of assessment is issued.

Does this clarify the purpose of my question to you?

A. Well, the purpose of your question; yes. But I am not sure what the question is.

Q. Well, the question was, in what manner do you make

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[578] continue in business, what information we have available on that, and the previous history of violations.

We never have two identical ones. We don't compare them that way. We go on each inspection citation. The violations that have been alleged are reviewed for that mine based on the other six criteria. They are not compared.

I think that we have very consistent evaluation in this way. But there are so many variables, we do not have specific weight. We take the history of previous violations, we go through all of them after we first establish that the violation did occur. Then we proceed from there on the basis of that.

Q. Let me interrupt again at that point if I may.

You say you first establish the violation did occur. You establish that by looking at the notice of violation?

A. Yes.

Q. If it states on its face a description of the section of the Act that has been violated, that then is treated as an established violation?

A. For the purpose of making a proposed assessment.

MR. SMITH: Initial proposed assessment.

By MR. KILCULLEN:

Q. You are distinguishing now between an initial

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[47] have another one, well, say the case number is 301, the second assessment period will be 301-1. That is another



order of assessment, and so on.

That means that we have made 7,805 proposed orders of assessment.

Q. So within that 7,805 cases, you had 95,655 violations listed?

A. Yes, sir.

Q. And you assessed for those violations——

A. Proposed.

Q. ——$20,134,211?

A. Yes.

MR. KILCULLEN: I think I will offer this as Turner Deposition Exhibit No. 7.

(Interoffice Memorandum was marked Turner Deposition Exhibit No. 7.)

By MR. KILCULLEN:

Q. In making the proposed assessments, do you make any written findings regarding the factual information, the findings of fact regarding the alleged violation, or any findings respecting the various criteria that are specified—written findings I am talking about—such as size of the mine, whether the operator was negligent, past history of [48] violations, the effect of the assessment upon the operator's ability to stay in business, or the operator's good faith in correcting the violations?

A. We do not make any written record as findings.

Q. The regulation, Part 100, requires in determining the amount of the proposed penalty in two places, as you are well aware, Mr. Turner, in Section 100.2 and in Section 100.3(c)—100.2 says: Each proposed assessment shall be made after taking into consideration (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

The same criteria are set forth, the same words, in Section 100.3(c) of the regulations.

When you make an assessment, do you have before you in each case, in each and every case, information respecting the operator's history of previous violations?

A. Not in every case do we have it available.
Q. Can you elaborate on that a little bit? What do

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[338] We either amend, revise or reissue that proposed Order of Assessment, and we notify the operator of our action.

By Mr. Kilcullen:

Q. Do you sometimes meet with the operator?
A. Yes; we do.
Any time that the operator wants to meet with us, we will meet with him and discuss not only the violations or the alleged violations or the circumstances surrounding the thing, but also our procedures.
Q. Do you make any record or notation or do you place in the assessment file any documentation regarding the meetings or discussions you have with the operator?
A. I don't think so. There might be an occasional one but not as a practice.
Q. As a result of the meeting with the operator, if you amend the—or revise the assessment, proposed assessment order in any manner, do you include in the file, the assessment file, any decision or finding or other documentation explaining the reasons for the amendment or revision?
A. In most instances, we require this to be in writing. We will have a conference and discuss it, but we require them to submit the additional information in writing; and that is placed in the file.
[339] A. The operator to supply the information that will give us orally in a conference, and we suggest to him what to do, how to supply us with that information, what form; so the protest should be in writing.
Q. What I asked, though, is not what the operator submits but what you place in the file as your documentation for your action, whatever it might be.
A. As a result of the conference?
Q. Yes.
A. No. We tell the operator at the time; we do inform him of our decision of what we reach at that time; but we do not record it as such in the file.
However, it does reflect in the—if we amend it—in the proposed assessment.
Q. You say in the amount—



A. Yes.
Q. If the amount is changed.
A. Right.
Q. But there is no explanation or finding that would describe the reasons why the change was made.
A. No. But that is described to him orally. It is explained to him.
[340] Q. If he comes in.
A. Yes.
Q. Now, at the initial stage, where you get the notice of violation or the order of withdrawal first, as it comes to you, do you attempt to determine whether a violation did in fact occur?
A. Well, it doesn't come directly to me; it comes to our office and goes in the inspection file.
When that inspection file is pulled for assessment, the assessment officer does—he first attempts to establish that a violation has occurred; that is his first objective.
Now, we do have several hundred that come through here that we do not consider violations; they have not established them; and we do not make a proposed assessment for those.
However, sometimes we do send them back to the district or telephone the district to find out this additional information.
Q. When you telephone the district to get additional information, do you place any notations in the file regarding that or explaining what additional information was obtained?
A. Sometimes we do; most times we do not. However, we have more recently been referring those back with what we

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[366] Q. Now, then, other than the handwritten notation that might appear in this form, there would be no written decisions or findings explaining the action that was taken in either amending or affirming or vacating.
A. Well, there are lots of notes explaining, and a lot of files. I haven't made a search through them to find out; but I explained the action taken, especially on protests.
Q. Now, is there any information given to the operator apprising him of the reason for this particular action taken?

A. No; no, there isn't—unless it is given to him at a conference, at an informal conference, at this office or one of the other offices.

Q. When you affirm or amend or vate [*sic*] a proposed assessment or, proposed assessment order, no explanation is given to the operator?

A. That is right.

Q. Now, these notations—

MR. SMITH: No written explanation.

THE WITNESS: Yes.

MR. SMITH: Is that your question?

MR. KILCULLEN: That is correct; yes.

By MR. KILCULLEN:

Q. And no written findings of facts are made on this [367] regarding the action taken.

A. You mean as a result of a protest.

Q. That is correct.

When you affirm, amend, or vacate a proposed assessment order, no written findings of fact are made regarding that action.

A. No.

Q. Now, at that stage, Mr. Turner, no written finding has been made that a violation has occurred; is that correct?

A. No; that is not correct. It has been on the proposed order of assessment prior to that action.

Q. No, sir. I am talking about a finding that the violation did in fact occur. Now, there is nothing on the proposed order of assessment. This is the form that you had been using until September of this year; it is Exhibit 23. There is nothing on that that states any written finding of fact; is there?

A. That is correct. The one you are referring to are the ones used prior to September, before it was revised.

Q. Getting back then to the point where you have, after protest by the operator, affirmed, amended, or vacated the order.

No written finding of fact has been made up until

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*Morton* v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

## NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals to the United States Court of Appeals for the Third Circuit from the judgment entered by Judge Herbert P. Sorg, District Judge, dated May 25, 1973.

Filed: July 24, 1973

***MORTON* v. *EDWARD MEARS, ET AL.***
**No. 72-928, W.D. Pa.**



*Morton* v. *Edward Mears, Et Al.*
No. 72-928, W.D. Pa.

DOCKET ENTRIES

| | |
|---|---|
| 1972 | |
| Nov. 1 | Complaint Filed |
| Nov. 1 | Summons issued |
| Nov. 8 | Letter advising case assigned to Judge Weis |
| Nov. 9 | #285 Marshal form, exec on 11/3 on Edward Mears, by certif mail dated 11/1 |
| Nov. 9 | #285 Marshal form, exec on 11/3 on Earl Bence, by certif mail dated 11/1 |
| Nov. 9 | #285 Marshal form, exec on 11/3 on Charles J Mears by certif mail dated 11/1 |
| Nov. 9 | #285 Marshal form, exec on Murray Martin by certif mail dated 11/1 |
| Nov. 9 | #285 Marshal form, exec on Rocco Yanity by certif mail dated 11/1 |
| Nov. 9 | #385 Marshal form, exec on Yanity Brothers Coal a/k/a M. Y. Coal Co on 11/3, by certif mail dated 11/1 |
| Nov. 14 | Summons and forms 285 ret served on Casmer Yanity, indiv & t/d/b/a Yanity Bros Coal a/k/a M.Y. Coal on 11/9 and on Tony Yanity, indiv & t/d/b/a Yanity Bros Coal a/k/a M. Y. Coal Co on 11/9/72, by certif mail dated 11/1/72 |
| Nov. 27 | ANSWER filed by defts |
| Nov. 27 | Letter to Owens and Jacobs, Esqrs. advising case assigned to Judge Weis |
| 1973 | |
| Jan. 3 | Notice of Preliminary Conf. for 1/16/73 at 4:00 filed |

1973

| | |
|---|---|
| Jan. 16 | Preliminary conference held before Weis, J.—concluded CAV. Memo filed (no rep) |
| Feb. 16 | Motion for judgment on the pleadings, or, in the alternative, for summary judgment filed by defts. |
| Feb. 23 | Motion to extend time to answer defts motion for judmt on pleadings and/or summary judgment filed by U S and order ent granting plf 30 days from this order to file answer to defts' motions (Weis, J) |
| May 2 | Opposition to motion for judgmt on pleadings, or for summary; judgmt and cross motion for summary judgmt filed by U S with memorandum attached |
| May 3 | Notice setting status conference for 5/11 at 10 AM before Judge Snyder |
| May 11 | Status conference held before Snyder, J.—Memo filed (no rep) (briefs to be filed) |
| May 23 | Motion to amend complaint for enforcement of civil penalty assessment order and proposed order filed by pltf. |
| May 30 | Copy of letter to U S Atty's office dated 5/30, granting until 6/13 to file brief |
| June 19 | Order ent, attached to motion filed 5/23, granting motion to amend complaint and defts given 20 days to file answer (Synder, J) |
| June 20 | Letter to John L Kilcullen from James Drach. Dep Clerk |
| June 25 | Praecipe for appearance for deft filed by Henry Ingram. Esq. |
| June 25 | Defts' supplemental memorandum of points and authorities in support of motion to dismiss filed |
| June 28 | Order ent granting defts' motion for summary judgmt (Snyder, J) |
| June 28 | Pursuant to motion filed and order ent, deft's motion for summary judgmt is granted (B. Schaffler, Clerk) |



1973

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|---|---|
| June 28 | Notice mailed |
| July 10 | Motion for leave to withdraw appearance filed by John Owens with proposed order |
| July 10 | ORDER entered granting Motion for leave to withdraw appearance filed by John Owens. (Snyder, J.) |
| Aug. 24 | NOTICE OF APPEAL FILED BY US (from judmnt ent 6/28/73) |
| Aug. 24 | Copy notice of appeal, letter to ct of appeals, letters to counsel, jdge |
| Sept. 24 | ORIGINAL RECORD mailed ct of appeals (no exhibits) |
| Oct. 5 | Notice from ct appeals—case docketed at 73-1848 |
| Oct. 5 | Receipt from ct appeals for orig record |

1974

| | |
|---|---|
| Apr. 1 | Opinion of U.S. Ct. of Appeals rec'd and filed affirming judgment of District Court (filed 72-857) |
| June 13 | cc judgmt in lieu of formal mandate affirming judgmt of district court and taxing costs in favor of defts and against plf U S in the amt of $243.60 |
| June 13 | Judgmt for costs in the amt of $243.60 ent in favor of defts and against plf US inasmuch as costs were taxed by ct of appeal (Bl Schaffler, Clerk) receipt issued for |
| June 17 | Order recd from ct of appeals amending opinion filed March 20, 1974 1st sentence is amended and last word in line 10 on page 9 is deleted (filed 72-857) |

1975

| | |
|---|---|
| Feb. 24 | Record forwarded to Supreme Court pursuant to telephone conversation requesting same |

IN THE UNITED STATES COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | |
|---|---|
| ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior, *Plaintiff* v. EDWARD MEARS, EARL BENCE, CHARLES J. MEARS, MURRAY MARTIN, ROCCO YANITY, CASMER YANITY, and TONY YANITY, Individually and as partners, t/d/b/a YANITY BROTHERS COAL COMPANY, a/k/a M. Y. COAL COMPANY, *Defendants* | Civil Action No. 72-928 |

## COMPLAINT FOR ENFORCEMENT OF CIVIL PENALTY ASSESSMENT ORDER

The Petition of Rogers C. B. Morton, by Richard L. Thornburgh, United States Attorney for the Western District of Pennsylvania, respectfully shows that:

1. This Complaint is for the enforcement of a civil penalty assessment order issued under an act of the United States namely, the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. § 801, *et seq.*) (the Act).

2. Jurisdiction of this action is conferred upon the Court by § 109(a) of the Act 930 U.S.C. § 819(a) and 28 U.S.C. § 1355.

3. Defendants are and at all relevant time were Edward Mears, Earl Bence, Charles J. Mears, Rocco Yanity, Murray Martin, Casmer Yanity and Tony Yanity, individuals and partners, trading and doing business as Yanity Brothers Coal Company, also known as M. Y. Coal Company, as set forth in registration under the Fictitious Names Act, filed on May 20, 1966 and registered on or about June 3, 1966 in the Prothonotary's office of Indiana County, in the Western District of Pennsylvania, operating a coal mine subject to



the Act in Indiana County, Pennsylvania, within the jurisdiction of this Court, and maintaining its principal office at 11 East Pike, Indiana, Pennsylvania 15701.

4. Pursuant to Section 109(a) of the Act, a civil penalty in the amount of $680.00 was lawfully assessed against Defendants for violation of the Act. A true copy of the Proposed Order of Assessment, which, in the absence of any protest or request by the Defendants for a hearing, became final on October 26, 1971, is attached hereto and made a part hereof Petitioner's Exhibit "A".

5. Further pursuant to Section 109(a) of the Act, a civil penalty in the amount of $1,320.00 was lawfully assessed against Defendants for violation of the Act. A true copy of the Proposed Order of Assessment, which, in the absence of any protest or request by the Defendants for a hearing became final on April 11, 1972, is attached hereto and made a part hereof Petitioner's Exhibit "B".

6. Said assessment orders have not been vacated, modified, reversed or withdrawn and therefore are the final orders of the Secretary of the Department of the Interior, within the meaning and purview of Section 109(a) of the Act (30 U.S.C. § 819(a)(4)).

7. Despite demand, Defendants have failed and refused to pay said civil penalties as required by law.

WHEREFORE, Plaintiff prays that the Court enter judgment against Defendants for $2,000.00 together with interest and costs.

[Filed November 1, 1972]

**UNITED STATES OF AMERICA**
**DEPARTMENT OF THE INTERIOR**
**BUREAU OF MINES**
**WASHINGTON, D.C.**

**August 4, 1972**

**CERTIFICATION OF RECORD**

***Pursuant to Title 30, Section 819(a)(4), Title 43, Section 1460, and Title 28, Section 1733, United States Code, and by virtue of the authority delegated to me by the Secretary of the Interior, I hereby certify that the annexed documents are true copies of the official record of the Bureau of Mines in the matter of the assessment of civil penalty against M. Y. Coal Company M. Y. No. 1 Mine Clymer, Indiana County, Pennsylvania Bureau of Mines Case No. 2307-1***

***TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of the Bureau of Mines, Department of the Interior, to be affixed on the day and year first above written.***

**/s/ Everett Turner**



UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240

August 4, 1972

Re: M. Y. Coal Company
Operator
Case No. 2307-1

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE PROPOSED ORDER OF ASSESSMENT DATED October 26, 1971 DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

/s/ Everett Turner
ASSESSMENT OFFICER

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02396-0

IN THE MATTER OF
M. Y. Coal Company
Clymer, Indiana County, Pennsylvania

Case No: 2307-1
Mine: M. Y. No. 1

*PROPOSED ORDER OF ASSESSMENT*

The above-captioned matter having come on for consideration and consideration having been given to all available information, including the operator's history of previous violations, the appropriateness of the proposed assessment to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged;

it is hereby ordered that M. Y. Coal Company be and the same is hereby assessed a civil penalty in the amount of Six hundred eighty dollars ($680.00) for the following violations:

| Violation No. | Date Issued | Violation | Assessment |
|---|---|---|---|
| 1 R.C.C. | 04-14-71 | 75.701 | $ 25.00 |
| 1 R.C.C. | 04-15-71 | 75.200 | 200.00 |
| 2 R.C.C. | 04-15-71 | 75.603 | 50.00 |
| 5 R.C.C. | 04-15-71 | 75.1704 | 25.00 |
| 2 L.R.S. | 06-29-71 | 70.100 | 25.00 |
| 1 R.J.C. | 09-13-71 | 75.303 | 25.00 |
| 2 R.J.C. | 09-13-71 | 75.512 | 30.00 |
| 3 R.J.C. | 09-13-71 | 75.1100 | 100.00 |
| 4 R.J.C. | 09-13-71 | 75.507 | 100.00 |
| 5 R.J.C. | 09-13-71 | 75.516 | 100.00 |

Total Assessed Amount $680.00

/s/ Everett Turner
Assessment Officer

Dated at Washington, D.C.
and entered as the Proposed
Order of Assessment
October 26, 1971

EXHIBIT "A"



**UNITED STATES OF AMERICA**
**DEPARTMENT OF THE INTERIOR**
**BUREAU OF MINES**
**WASHINGTON, D.C.**

**August 4, 1972**

**CERTIFICATION OF RECORD**

***Pursuant to Title 30, Section 819(a)(4), Title 43, Section 1460, and Title 28, Section 1733, United States Code, and by virtue of the authority delegated to me by the Secretary of the Interior, I hereby certify that the annexed document are true copies of the official record of the Bureau of Mines in the matter of the assessment of civil penalty against M. Y. Coal Company M. Y. No. 1 Mine Clymer, Indiana County, Pennsylvania Bureau of Mines Case No. 2307-2***

***IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of the Bureau of Mines, Department of the Interior, to be affixed on the day and year first above written.***

**/s/ Everett Turner**

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: M. Y. Coal Company
Operator
Case No. 2307-2

August 4, 1972

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE PROPOSED ORDER OF ASSESSMENT DATED April 11, 1972 DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

/s/ Everett Turner
ASSESSMENT OFFICER



UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240

ID: 36-02396-0

April 11, 1972

IN THE MATTER OF: Re: Mine: MY No. 1
M. Y. Coal Company Case No: 2307-2
Clymer, Indiana County, Pennsylvania

*PROPOSED ORDER OF ASSESSMENT*

The above-captioned matter having come on the for consideration and consideration having been given to all available information, including the operator's history of previous violation, the appropriateness of the proposed assessment to the size of the business of the operator charged, whether the operator was negligent, the effect of the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged:

it is hereby ordered that M. Y. Coal Company be and the same is hereby assessed a civil penalty in the amount of one thousand three hundred twenty dollars ($1,320.00) for the following violation:

| Violation No: | Date Issued: | Violation: | Assessment: |
|---|---|---|---|
| 1 RJC | 09-16-71 | 77.410 | $ 25.00 |
| 1 SBR | 11-17-71 | 104(i) Order 70.100 | 1,000.00 |
| 1 CWN | 12-06-71 | 75.301 | 90.00 |
| 1 CWN | 12-15-71 | 70.100 | 30.00 |
| 1 CLG | 01-31-72 | 75.515 | 40.00 |
| 1 AGF | 02-11-72 | 75.516 | 55.00 |
| 1 WFM | 02-29-72 | 75.521 | 45.00 |
| 2 WFM | 02-29-72 | 75.518 | 35.00 |

Total Assessed Amount $1,320.00

/s/ Everett Turner
Assessment Officer

Dated at Washington D. C.
and entered as the Proposed
Order of Assessment
April 11, 1972

EXHIBIT "B"



*Morton* v. *Edward Mears, et al.*
No. 72-928, W.D. Pa.

ANSWER

Defendant, Edward Mears, Earl Bence, Charles J. Mears, Murray Martin, Rocco Yanity, Casmer Yanity and Tony Yanity, Individually and as partners t/a/d/b/a Yanity Brothers Coal Company a/k/a M. Y. Coal Company, through their attorney, Owens and Jacobs, respectfully submits that:

1. Admitted.

2. Denied, that this Court has no power to assume jurisdiction in a matter which violates the "due process" clause of the Fourteenth Amendment of the Constitution of the United States.

3. Admitted that Defendant is, and at all relevant times was, Edward Mears, Earl Bence, Charles J. Mears, Murray Martin, Rocco Yanity, Casmer Yanity and Tony Yanity, Individually and as partners t/a/d/b/a Yanity Brothers Coal Company, a/k/a M. Y. Coal Company, organized and existing under the laws of the Commonwealth of Pennsylvania; but it is denied that Defendant is subject to the Act (30 U.S.C. Section 819(a) and 29 U.S.C. Section 1355), and that he is within the jurisdiction of this Court.

4. Denied that a civil penalty in the amount of $680.00 was lawfully assessed against the Defendant and furthermore, Defendant has a full, just and proper defense to the said violation of Section 109(a) of the Act; it is further denied that Defendant failed to protest the Proposed Order of Assessment; it is also denied that the Proposed Order of Assessment became final on October 26, 1971.

5. Denied that a civil penalty in the amount of $1,320.00 was lawfully assessed against the Defendant and furthermore, Defendant has a full, just and proper defense to the said violation of Section 109(a) of the Act; it is further denied that Defendant failed to protest the Proposed Order of Assessment; it is also denied that the Proposed Order of Assessment became final on April 11, 1972.

6. Admitted that to date said assessment order has not been withdrawn, vacated, modified or reversed, but denied that therefore it is final for the said order violates the "due

process'' clause of the Fourteenth Amendment of the Constitution of the United States, provisions of the Act itself, and other relevant statutes because Defendant was not granted a hearing; nor was a hearing set at a reasonable time or convenient location; nor was the procedure for obtaining and prosecuting said appeal such that a person in Defendant's position could reasonably take advantage of the right if afforded.

7. Admitted that the Defendant has failed to pay said assessment because the penalty is against the law for the reasons stated in paragraphs 2, 3, 4, 5, and 6, and that Defendant feels that he owes no civil penalty.

WHEREFORE, Petitioner[*sic*] respectfully prays that the Court enter judgment against the Plaintiff and all proper costs be placed on Plaintiff.

[Filed November 27, 1972]



*Morton* v. *Edward Mears, et al.*
No. 72-928, W.D. Pa.

## MOTION FOR JUDGMENT ON THE PLEADINGS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants by their attorneys herewith move the Court for judgment on the pleadings, or, in the alternative, for summary judgment, on the ground that there exists no genuine issue of material fact, and defendants are entitled to judgment as a matter of law.

As more fully shown in respondent's attached Memorandum of Points and Authorities, the civil penalty assessment orders sought to be enforced by plaintiff Morton are legally invalid and unenforceable because:

1. Such orders were not lawfully issued pursuant to and in accordance with the civil penalty provisions of the Federal Coal Mine Health and Safety Act of 1969.

2. Such orders do not comply with and are contradictory to the express provisions of regulations adopted by the Secretary of the Interior governing assessment of civil penalties under Section 109(a) of said Act.

3. Such orders do not comply with established rules of administrative procedure and due process of law.

[Filed February 16, 1973]

*Morton* v. *Edward Mears, et al.*
No. 72-928, W.D. Pa.

ORDER OF COURT

And now, this 19th day of June, 1973, upon motion of Alexander L. McNaugher, Assistant United States Attorney, attorney for plaintiff, and upon consideration thereof, it is ORDERED and DECREED: that Paragraph No. 4 of the Complaint be amended to read as follows:

"4. Pursuant to Section 109(a) of the Act, a civil penalty in the amount of $680.000 was lawfully assessed against the defendants for violation of the Act. A true copy of the amended proposed order of assessment is attached hereto, made part hereof and marked Exhibit "A". Said amended proposed order of assessment, after defendants were given the opportunity for hearing, and, in the absence of any protest or request by the defendants for a hearing, became final on October 26, 1971."

that Paragraph No. 5 of the Complaint be amended to read as follows:

"5. Pursuant to Section 109(a) of the Act, a civil penalty in the amount of $1,320.00 was lawfully assessed against the defendants for violation of the Act. A true copy of amended proposed order of assessment is attached hereto, made part hereof and marked Exhibit "A". Said amended proposed order of assessment, after defendants were given the opportunity for hearing, and, in the absence of any protest or request by the defendants for a hearing, became final on April 11, 1972."

and that the defendant shall be given twenty (20) days to file an Answer to the above amended paragraphs.

/s/ Daniel J. Snyder Jr.
United States District Judge



IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROGERS C. B. MORTON, Secretary of Interior, United States Department of the Interior, et al

vs.

EDWARD MEARS, et al, d/b/a M. Y. Coal Company, et al

Civil Action 72-928

ORDER OF COURT

AND NOW, to-wit, this 28th day of June, 1973, after oral argument and upon due consideration of the record and the briefs submitted by counsel IT IS ORDERED, ADJUDGED AND DECREED that for the reason stated in the Memorandum of the Honorable Herbert P. Sorg in the case of *Rogers C. B. Morton, Secretary of the Interior, United States Department of the Interior vs. G. M. W. Coal Company, Inc.*, at Civil Action No. 72-890 (W.D. Pa. filed May 25, 1973), defendants' Motion for Summary Judgement will be granted. See also: *National Independent Coal Operators Association, et al vs. Rogers C. B. Morton, Secretary of The Interior, et al*, Civil Action No. 397-72 (D.C. D.C. 3/9/73); *Morton v. Delta Mining Co.*, Civil 72-857 (W.D. Pa. 5/25/73).

/s/ Daniel J. Synder Jr.
UNITED STATES DISTRICT JUDGE

*Morton* v. *Edward Mears, et al.*
No. 72-928, W.D. Pa.

NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals to the United States Court of Appeals for the Third Circuit from the judgment entered by Judge Daniel J. Snyder, Jr., United States District Judge, dated June 28, 1973.



SUPREME COURT OF THE UNITED STATES
No. 74-521

Rogers C. B. Morton, Secretary of the Interior,
*Petitioner,*

v.

Delta Mining, Inc., et al

ORDER ALLOWING CERTIORARI. Filed January 27, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 74-2066 and a total of one hour is allotted for oral argument.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

☆ U.S. Government Printing Office: 1975—570-333/119